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Chapter 1: Torts

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PART I

Private Law

CHAPTER 1

Torts

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A. Court Decisions

§1.1. Products liability. Regretfully, the Supreme Judicial Court has again held fast to the privity of contract defense in products liability warranty actions, indicating that Massachusetts will remain loyal, at least for the present and perhaps for a considerable period of time, to an archaic relic of the past, long deemed indefensible by an overwhelming weight of judicial and secondary authority authored by many eminent jurists and legal scholars.[1]

Kenney v. Sears, Roebuck & Co.[2] involved a damage action brought by two tenants in common of a two-family dwelling house owned by them to recover for fire damage to the building and certain personalty caused when a refrigerator caught fire. The appliance had been purchased by one of the co-tenants, Mrs. Kenney, from the defendant Sears, Roebuck & Company for use by her in her apartment. The other co-tenant, Mrs. Copanas, was Mrs. Kenney's mother and apparently lived in the other apartment in the house. An action of tort or contract was brought against Sears, the retailer, and the Whirlpool Corporation, the manufacturer of the refrigerator, on several theories, charging both with negligence and breach of warranty. Mrs. Kenney was a plaintiff on each of 12 counts. Her mother, Mrs. Copanas, was co-plaintiff on three counts, charging both defendants with breach of implied warranties of fitness and merchantability. At trial, verdicts were directed for defendants on all counts except two by Mrs. Kenney charging Sears with breach of implied warranties. Judgment was entered on jury verdicts for Sears on these counts. Both plaintiffs appealed.

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§1.1. [1] See, e.g., Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966); Jaeger, How Strict Is the Manufacturer's Liability? Recent Developments, 48 Marq. L. Rev. 293 (1964-1965).
[2] 1969 Mass. Adv. Sh. 567, 246 N.E.2d 649.

The Court easily disposed of the negligence counts on evidentiary grounds since the expert testimony in the record did not resolve the critical question of "whether the fire was caused within the refrigerator or by some external combustion."[3] The case against Whirlpool was particularly weak. There was no showing that the refrigerator "was delivered to Sears in good order or that it had not been mishandled by Sears, or by other handlers on its way from Whirlpool to Sears."[4] Referring to its earlier decision in *Carter v. Yardley & Co.*,[5] which abolished the privity defense in negligence actions, the Court stated, "[t]he burden still remains upon the plaintiffs, in a case . . . brought by persons not in privity with the manufacturer, to show that 'a defect attributable to the manufacturer's negligence caused the injury.' "[6] It was also suggested in the opinion that Whirlpool might have had a defense to any negligence count since the refrigerator had been running with signs of defective operation for over a year without having been repaired, thus presenting the issue whether Whirlpool reasonably might have relied upon Sears, as retailer, to make necessary repairs under its own warranty.[7]

While the Court's decision on the negligence counts is thus well founded on the law and firmly substantiated on the record, its decision on the warranty counts is most egregious. Without any analysis of the legal or economic issues involved, the Court dismissed all implied warranty counts against the manufacturer with a simple statement: "So far as the counts against Whirlpool are framed on any basis other than negligence, they do not state any ground of liability recognized in *Carter v. Yardley & Co.* . . ."[8] Mrs. Copanas's warranty count against the retailer was treated with similar disdain and dismissed with the same irrationality and the simple observation that "Sears's liability is limited by [Uniform Commercial Code §2-318] to injuries to the *person* of those 'in the family or household of' the buyer or of one 'who is a guest in his home.' "[9]

The reaction of the Court and its upholding of the directed verdicts on the warranty counts is indefensible. The fatal blow to the privity-of-contract defense to implied warranty actions was delivered by the decision of the Supreme Court of New Jersey in *Henningsen v. Bloomfield Motors, Inc.*,[10] a case which must be recognized as one of the most, if not *the* most, influential decisions in the entire history of Anglo-

[3] Id. at 569, 246 N.E.2d at 652.

[4] Ibid.

[5] 319 Mass. 92, 96-98, 64 N.E.2d 693, 695-697 (1946).

[6] Kenney v. Sears, Roebuck & Co., 1969 Mass. Adv. Sh. at 570, 246 N.E.2d at 652-653, quoting from Carney v. Bereault, 348 Mass. 502, 506, 204 N.E.2d 448-451 (1965).

[7] Id. at 570, 246 N.E.2d at 652. The Court here made reference to its decision during the 1968 SURVEY year in Haley v. Allied Chemical Corp., 353 Mass. 325, 330, 231 N.E.2d 549, 553 (1967), noted in 1968 Ann. Surv. Mass. Law §3.3, at 46.

[8] Id. at 571, 246 N.E.2d at 653.

[9] Ibid.

[10] 32 N.J. 358, 161 A.2d 69 (1960).

Saxon law. The effect of this decision was immediate and startling. As Dean Prosser has ably pointed out, "What has followed has been the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."[11] Warranty actions permitting recovery of damages against remote vendors in the distributive chain of merchants through which goods move from manufacturers to ultimate consumers have now become a firmly entrenched and well recognized basis of tort liability throughout the United States. Moreover, liability on warranty theories has not been limited to purchasers of products or services. Warranty protection was extended by the National Conference of Commissioners on Uniform State Laws in the Uniform Commercial Code to "persons . . . in the family or household [of the buyer or] a guest in his home."[12] It was extended by the American Law Institute in the Restatement of Torts Second to the person or property of "the ultimate user or consumer";[13] and, most importantly, the courts have extended it to the expanded class of foreseeable innocent bystanders who may be injured by defective products in both sale and non-sale cases.[14] In thus expanding the scope of warranty protection, the courts have maintained a position of neutrality as to the extent of possible claims proposed by the draftsmen of the code and the Restatement. In official comments to these codes, the authors state their intentions not to confine the class of protected beneficiaries to those enumerated in the text of the rules, but to permit the question to be determined by developing case law on the subject.[15] In their decisional warranty opinions, the courts have also recognized

11 Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. at 793-794.

12 U.C.C. §2-318.

13 2 Restatement of Torts Second §402A (1965).

14 See, e.g., the following Connecticut decisions: Garthwaith v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965) (patron of beauty parlor permitted recovery on decisional tort warranty action against manufacturer of hair coloring dye, despite lack of privity and absence of sale as opposed to rendition of services); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965) (allowing estate of golfer to recover damages for death caused when unattended automobile rolled out of parking lot down incline to fairway and hit him, despite lack of privity and the absence of sale); Simpson v. Powered Products of Michigan, Inc., 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963) (upholding suit brought by golfer, injured while using defective golf cart rented from golf professional, against golf pro himself, distributor, and manufacturer, despite lack of privity and absence of sale). See also the discussion of these and other decisions in Donovan, Recent Developments in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code, 19 Maine L. Rev. 181, 231-238 (1967).

15 Official Comment 3, §2-318 of the U.C.C., provides: "This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchasee. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."

Official Comment *o* to 2 Restatment of Torts Second §402A provides: "The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by [non-users and non-consumers]."

the fact that tort liability without fault and without privity for harm caused by defective products is the law of the future, if not the present. Since consumers everywhere are already paying for this protection, the courts have felt compelled to give them the benefits of its immediate adoption.

Quite clearly, the handwriting is on the wall. Strict liability is rapidly becoming the law of the land. The question thus forcefully arises: Why is it not the law of Massachusetts? Is there any justification for retention of the privity defense in products liability cases? The Supreme Judicial Court cannot continue to avoid this most pressing of all tort questions. In the 1968 SURVEY we thought it wise to recall the words of such significant laymen and lawyers as Aristotle and Oliver Wendell Holmes, Jr.[16] In light of the Court's inexcusable decision, we find it not only wise but expedient and necessary to recall them here as well.

> . . . Even when laws have been written down, they ought not always to remain unaltered.[17]

> . . . It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the past.[18]

§1.2. Deceit: Knowledge. In the 1969 SURVEY year, the Court re-examined areas of the law concerning deceit and overruled some early and outdated cases which had held that a false statement made without recklessness or knowledge of the truth will not support an action for deceit. In *Powell v. Rasmussen*,[1] the defendant had informed the plaintiff that certain stock was for sale and asked whether plaintiff was interested in the investment. Plaintiff responded affirmatively, stating that he would put up $5000 toward the purchase price if all other money necessary for the purchase was raised. Later, defendant told the plaintiff that a third party with sufficient funds planned to acquire the stock for $100,000 and "if the plaintiff wanted 'to get in on it,'" the third party was holding the last $5000 worth of stock for him.[2] Plaintiff then purchased the stock, paying with two checks drawn to the order of the third party. Stock certificates were issued to him. Between the dates on which the two checks were drawn, the third party executed a contract to purchase all the stock for $100,000. The actual sale of the stock never took place, however, because the third party was unable to raise the purchase price. The stock held by plaintiff became worthless and plaintiff sued in tort for deceit.

16 See 1968 Ann. Surv. Mass. Law §3.4, at 49.
17 Aristotle, Politica (Politics) ii.8. 1269a8-10.
18 Holmes, The Path of the Law, reprinted in The Law of Literature 614, 626 (London ed. 1966).

§1.2. 1 1969 Mass. Adv. Sh. 13, 243 N.E.2d 167.
2 Id. at 14, 243 N.E.2d at 168.

The trial court directed a verdict for the defendant upon plaintiff's failure to prove the defendant had known his statement to be false. On appeal, the Supreme Judicial Court reversed, stating:

> . . . it has been held in a long line of cases[3] that "the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided that the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive."[4]

This approach is supported by Section 526 of the Restatement of Torts Second, which provides:

> A misrepresentation in a business transaction is fraudulent if the maker
>
> (a) knows or believes the matter to be otherwise than as represented, or
>
> (b) knows that he has not the confidence in its existence or nonexistence asserted by his statement or knowledge or belief, or
>
> (c) knows that he has not the basis for his knowledge or belief professed by his assertion.

Under Subsection (c) and the Massachusetts rule, a statement is fraudulent if a speaker represents he has personal knowledge of a fact when he does not, even though he is honestly concinced of its truth from hearsay or other sources.[5]

The action of the trial court in directing a verdict for the defendant finds some support in a few early Massachusetts decisions which required that the speaker either know of the untruth or be reckless as to the truth or falsity of the statement.[6] These cases were expressly overruled in *Powell.* Massachusetts law is now in accord with the observation of Mr. Justice Holmes in his dissent to one of them:

> The representation was not made in casual talk, but in a business matter, for the very purpose of inducing others to lay out their money on the faith of it. When a man makes such a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to know what that meaning is.[7]

[3] Id. at 15, 243 N.E.2d at 169.—Ed.

[4] Id. at 14, 243 N.E.2d at 168.

[5] 3 Restatement of Torts Second §526, Comment *f.*

[6] Alpine v. Friend Bros., Inc., 244 Mass. 164, 167, 138, N.E. 553, 554 (1923); Thaxter v. Bugbee, 59 Mass. 221, 223 (1849); Tryon v. Whitmarsh, 42 Mass. 1, 7-8 (1840).

[7] Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 586, 40 N.E. 1039, 1042 (1895).

§1.3. Deceit by agent: Unauthorized by principal. In *Doody v. John Sexton & Co.*,[1] plaintiff was promised by two of defendant's officers lifetime employment in defendant's Los Angeles office if he would move to California. Plaintiff accepted but found that he was "out of phase" with his California manager, who set forth terms of employment different from those which had been promised. When plaintiff asked defendant's officer if he had been "kidding" about the promise of employment, the officer replied affirmatively. Having terminated his employment and having returned to Boston, plaintiff brought an action in federal court against the defendant for breach of contract and fraudulent misrepresentation. Verdict for defendant was directed on the contract count on the ground that defendant's officers had neither real nor apparent authority to promise lifetime employment. On the misrepresentation count, verdict was returned for plaintiff. Defendant appealed and the United States Court of Appeals for the First Circuit, applying Massachusetts law, affirmed, holding that a promise made without intention to perform is actionable and that a principal may be held liable in tort when such a promise is made by its agent, even though the agent was unauthorized to make the promise.

Since it could not be held liable in contract for the unauthorized undertaking of its agent, the defendant argued it should not be held liable in tort: "[T]ort liability would be illogical, and merely open the back door when the front door was closed."[2] In rejecting this argument the court noted that a principal may be held accountable in tort for unauthorized acts of an agent "not too far removed from the scope of his authority, even though, strictly, they were not authorized."[3] The court, however, declined to rely on this general principle but rather held that *Robichaud v. Athol Credit Union*[4] was "closely in point" and supportive of plaintiff's argument.

In *Robichaud*, a representative of defendant lender "who had authority to deal with such matters" told plaintiff borrower that his loan was covered by life insurance under defendant's group policy. However, the loan was for 15 years, and a Massachusetts statute did not permit insurance on loans in excess of 10 years. Defendant was held liable for misrepresentation "[e]ven if furnishing insurance would have been beyond the defendant's power."[5] Therefore, argued the court in *Doody*, since the officers making the promise of employment were the president and vice-president of defendant corporation, they "clearly possessed certain hiring powers, [and] plaintiff had a right to rely on their representation even though their actual authority did not extend to the point they indicated,"[6] that is, to a promise of lifetime employment.

§1.3. [1] 411 F.2d 1119 (1st Cir. 1969).
[2] Id. at 1122.
[3] Ibid.
[4] 352 Mass. 351, 225 N.E.2d 347 (1967).
[5] Id. at 355, 225 N.E.2d at 350.
[6] Doody v. John Sexton & Co., 411 F.2d at 1122.

In *Robichaud* the Supreme Judicial Court expressly ruled that the agent making the misrepresentation had apparent authority to do so. Thus, the decision simply holds that where the agent making the statement is clothed with apparent authority, the principal may be liable for the misrepresentation of his agent even though the *principal* lacked the authority to effect the action promised by the agent. The decision is undoubtedly correct since the legal inability of the principal to effect the transaction promised does not constitute a defense to a deceit action predicated upon the principal's own misrepresentations.

Since the Court in *Doody* ostensibly found the defendant's officers had apparent authority to promise lifetime employment, the *Robichaud* principle was properly found controlling.

§1.4. **Deceit: Damages.** Two cases arose in the 1969 SURVEY year dealing with the measure of damages in an action of deceit. In *Melvin v. H. J. Nassar Motor Co.*,[1] the plaintiff bought a new automobile which he claimed was defective. The declaration contained three counts, the first for breach of warranty, the second for breach of warranty stating a right to rescind, and the third in tort for deceit. Defendant's motions for directed verdicts on all counts were denied and the jury returned a verdict for plaintiff of $4000 on each count. On defendant's motion for a new trial, the trial judge ordered that unless the plaintiff remitted $1500 on each count the verdicts would be set aside and a new trial ordered. The plaintiff elected to take $2500 on the deceit count and waived the other two. On appeal by the defendant, the Supreme Judicial Court reversed, finding the evidence insufficient to establish the value of the defects, although proof of defect was clear. The Court did, however, conclude that the trial court properly charged the jury that the measure of damages in deceit actions was "the difference in value of property as it was and as it would have been if as represented."[2]

In *Goldman v. Mahoney*,[3] plaintiffs, who had purchased a house later found to have a leaky basement, sued for damages both in tort, for false representation that the house was dry, and in contract, for breach of an undertaking given as part of the sale that defendants guaranteed the house for one year. The jury found for the defendants on both counts, and the plaintiffs appealed, alleging, among other things, impropriety in the jury instructions on the measure of damages. The trial court had properly ruled that the plaintiffs were entitled to recover damages sufficient to give them the benefit of their contractual bargain if such damages were reasonably proved. Normally, as in *Melvin*, "benefit of the bargain" damages means the difference between the value of the property as represented and the value of the property as actually received by the plaintiff. Here, however, there was a complication because the defendants had made improvements on the drainage system pursuant to their guaranty. Consequently, the judge stated at one point in his charge that damages should be measured by

§1.4. 1 1969 Mass. Adv. Sh. 653, 246 N.E.2d 679.
2 Id. at 654, 246 N.E.2d at 680.
3 1968 Mass. Adv. Sh. 1221, 242 N.E.2d 405.

determining "the value of the property as it was represented to be, and then test that against the value of the house as it was, in fact, delivered after all these arrangements had been ultimately completed and these additional things were performed by the defendant."[4] This correctly states the measure of damages in deceit actions. However, the jury instruction also contained the following statement:

> On the other hand, if you find that these plaintiffs got a tremendous buy from the beginning, that all of these misrepresentations, if there were any, were discounted in the price, that the house was worth every cent that they paid for it, and the misrepresentations didn't alter the value situation in any way, then if you come to that conclusion, the plaintiffs would be placed in the position of not having proved they were damaged.[5]

Plaintiffs took exception to this portion of the charge since it indicated no damages could be awarded if the property, as received and improved, had a value equal to or greater than the purchase price, though less than the value of the property as represented. However, the Supreme Judicial Court noted that other portions of the charge appearing both before and after the challenged language were proper. The Court ultimately held, in light of the evidence as to value in the record, which evidence established the value of the property as represented to be equal to the purchase price, that there was no prejudical error.

From this decision the question arises whether the Court impliedly disagreed with the challenged portion of the charge. It seems clear that it did: first, because the Court expressly held the other portions of the charge were correct; second, because it considered the question of prejudice on the challenged portions; and third, because it concluded on the evidence in the record of this case that there was in fact no prejudice to the plaintiffs resulting from the charge. Since the Court looked at the charge as a whole and expressly ruled portions of it were correct, it is difficult to argue that its ruling of no prejudice on the balance was an attempt to avoid a negative ruling on the law.

§1.5. Vicarious liability. In *Suckney v. Williams*,[1] the Supreme Judicial Court held that an employer may be liable for injuries to a bystander inflicted by an employee in connection with a labor dispute. The dispute in question in the case involved a disagreement between two unions over the delivery of alcoholic beverages. Plaintiff, an innocent bystander, was walking by one of defendant trucking company's vehicles located outside a luncheonette when he was handed a leaflet by one of a number of pickets standing near the truck. The pickets

[4] Id at 1224, 242 N.E.2d at 409. The Court cites and quotes the Restatement of Torts Second §547 (Tent. Draft No. 10, 1964) and cites the case of Rice v. Price 340 Mass. 502, 507-510, 164 N.E.2d 894-895 (1960).

[5] Goldman v. Mahoney, 1968 Mass. Adv. Sh. at 1225 n.5, 242 N.E.2d at 409 n.5.

§1.5. [1] 1968 Mass. Adv. Sh. 1341, 242 N.E.2d 416.

were protesting the delivery by defendant of beer to the luncheonette. Kearns, an employee of defendant, was making the delivery, and, upon seeing plaintiff reading the leaflet, beat him with a long iron pipe.

Plaintiff brought an action in tort for assault and battery against the employer, alleging that, at the time of the assault, Kearns was acting within the scope of his employment. Following a denial of defendant's motion for directed verdict the jury found for the plaintiff. The Supreme Judicial Court affirmed, holding the jury could have found that the defendant's undertaking with its truck drivers was to make sure that the deliveries of beer got through to the customers despite labor difficulties. They could have found that the accomplishment of this purpose not uncommonly contemplates a demonstration of force or threats of force or actual use of force, and that Kearns, as driver's helper, was hired to provide that element of service of the contract.

Such findings, reasoned that Court, would bring the case within the rule which states that

> [a] master who authorizes a servant to perform acts which involve the use of force against persons or things, or which are of such a nature that they are not uncommonly accompanied by the use of force, is subject to liability for a trespass to such persons or things caused by the servant's unprivileged use of force exerted for the purpose of accomplishing a result within the scope of employment.[2]

This rule is not inapplicable, the Court held, "because the means used may be other than that intended by the contract of employment."[3]

The details of the labor dispute were not outlined in the Court's opinion, but the Court did indicate that Kearns was considered a "scab" by the picketing union. In view of this fact, it is possible that in assaulting the plaintiff Kearns might well have been motivated by personal reasons to retain for his union the business in dispute rather than a desire to insure the delivery of his employer's products. On this point, Comment *d* to Section 245 of the Restatement provides that the defendant employer should be relieved of liability where the servant has "no intent to act on his master's behalf." Comment *d* adds further that the employer's liability is not precluded merely because the "servant acts in part because of a personal motive." Defendant's argument that the assault by Kearns must be regarded as an act of "personal ill will" was rejected by the Court on the ground that the jury could reasonably have found that Kearns assaulted plaintiff for the purpose of demonstrating the degree of force he would use "in order to insure" the delivery of his employer's product.[4]

[2] Id. at 1343, 242 N.E.2d at 417. The rule, established in 1 Restatement of Agency §245, was cited and applied by the Court in Cowan v. Eastern Racing Assn. Inc., 330 Mass. 135, 145, 111 N.E.2d 725, 758.

[3] 1968 Mass. Adv. Sh. at 1343, 242 N.E.2d at 417.

[4] Ibid.

It appears from this decision and the Restatement that in future cases of this type a jury verdict will not be overturned where the evidence can reasonably support a finding that an employee was at least in part "acting on his master's behalf." Consequently, defense counsel will be well advised to seek a special verdict on the question of an employee's motivation.

In another case, *Konick v. Berke, Moore Co.*,[5] the Supreme Judicial Court indicated that it would "no longer follow" a long line of cases holding that "a master-servant relationship does not exist unless the employer has a right to control the manner and means (the details, in other words) of operating the car" driven by an employee. Under these older cases many employers were able to escape liability for the torts of their employees committed while on the employer's business.[6] In *Konick,* the Court reversed judgments entered in favor of an employer notwithstanding verdicts for two plaintiffs injured by the negligence of an employee. The injuries occurred while the employee, normally a timekeeper, was driving his own automobile for the purpose of picking up the company's payroll at the direction of his supervisor. The Court stated that where the negligent employee clearly was a servant in relation to his duties as a timekeeper, where he was instructed to do a specific job, and where he had at least implicit permission to use his own car, the fact that he chose the route and speed does not change his status to that of an independent contractor.[7]

§1.6. Damages: Attorney fees. During the 1969 SURVEY year the Supreme Judicial Court attempted to clarify the situations which permit recovery of counsel fees by parties to actions of tort.[1] In *M. F. Roach Co. v. Town of Provincetown*,[2] the plaintiff brought an action of contract and quantum meruit against the town to recover the costs of work performed under a unit price contract for construction of an airport. He joined the defendant in the suit in order to recover damages for intentional interference with his contractual rights under the construction contract with the town. Finding that the defendant had tortiously interfered with the plaintiff's contract, the trial court assessed damages for lost profits on uncompleted contract items and also awarded $7500 to cover plaintiff's counsel fees in prosecuting the claim against the town. On appeal the Court held that although counsel fees are generally not collectible as an element of damage, "the rule has its exception in the event of tortious conduct

[5] 1969 Mass. Adv. Sh. 405, 245 N.E.2d 750. See §1.18 *infra* for extensive discussion.
[6] Id. at 409, 245 N.E.2d at 751.
[7] Ibid.

§1.6. [1] Counsel fees are recoverable in other areas such as in divorce proceedings. Hayden v. Hayden, 326 Mass. 587, 96 N.E.2d 136 (1950). See also G.L., c. 208, §38, and cases thereunder. Statutes have also awarded counsel fees in specific situations. G.L., c. 93A, §9. The partner to a contract may also contract to cover attorney's fees.
[2] 1969 Mass. Adv. Sh. 707, 247 N.E.2d 377.

similar to that in this case requiring the victim of the tort to sue or defend against a third party in order to protect his rights."[3]

In these isolated instances, the plaintiff usually sues the tortfeasor to recover counsel fees in a second action. Here, however, both claims were joined in one lawsuit, but the Court, nevertheless, held that the plaintiff could recover counsel fees, basing its decision in the matter on a California case involving a similar issue. In *Prentice v. North American Title Guaranty Corp.*,[4] the plaintiffs, sellers of a plot of land, had agreed to subordinate a mortgage they held on the land in order to enable the purchasers to borrow money for the sole purpose of constructing an apartment building on the premises. The purchasers subsequently obtained a loan and gave a note secured by what had become the first mortgage. The defendant acted as escrow holder and closed the transaction pursuant to written instructions from the parties. The borrowed funds were not used for the apartment building, and the purchasers later filed for bankruptcy. Plantiff brought an action against the purchasers, the creditor whose loan was secured by the land, and the defendant escrow agent. The trial court granted plaintiff a decree quieting title to the land, found that the defendant was negligent in closing the sale, and assessed damages to cover counsel fees incurred by plaintiff in the action to quiet title. On appeal the California Supreme Court affirmed, holding the plaintiff could recover attorney fees even though the actions were consolidated.[5]

The Court in *Roach* cited only one Massachusetts case on the issue of counsel fees for the proposition that they are not ordinarily collectible.[6] Although the California case supports the general exception to that rule, it was used as authority only to support the holding that consolidation of actions does not prevent recovery of counsel fees. The Court's silence as to other Massachusetts cases is surprising since there is adequate Massachusetts authority to support the decision. An early Massachusetts case, *Wheeler v. Hanson*,[7] awarded counsel fees in a malicious prosecution action to cover costs expended in the defense of the earlier criminal action. *Wheeler* has become the basis of several other cases permitting recovery of counsel fees.[8] Representative of these cases is *Malloy v. Carroll*,[9] where plaintiffs, who had been expelled from a union, obtained an order directing their reinstatement. In a subsequent action they sought and recovered damages including an award for counsel fees expended in the first action.[10] Noting

[3] Id. at 708, 247 N.E.2d at 378.
[4] 59 Cal. 2d 618, 30 Cal. Rptr. 821, 381 P.2d 645 (1963).
[5] Id. at 620, 30 Cal. Rptr. at 823, 381 P.2d at 647.
[6] Chartrand v. Riley, 354 Mass. 242, 237 N.E.2d 10 (1968).
[7] 161 Mass. 370, 37 N.E. 382 (1894).
[8] Malloy v. Carroll, 287 Mass. 376, 191 N.E. 661 (1934); Ashton v. Walstenholme, 243 Mass. 193, 137 N.E. 376 (1922); Stiles v. Municipal Council of Lowell, 233 Mass. 174, 123 N.E. 615 (1919).
[9] 272 Mass. 524, 172 N.E. 790 (1930).
[10] Malloy v. Carroll, 287 Mass. 376, 191 N.E. 661 (1934).

that taxable costs generally are considered full compensation to the prevailing party, the Supreme Judicial Court willingly admitted that such costs are sometimes wholly inadequate:

> In actions based on wrongful conduct of the defendant, where the wrong is of such a character that the proper protection of the plaintiff's rights necessarily requires him to employ counsel to gain redress for the wrong, he may recover as an element of damage reasonable counsel fees. [Citing *Wheeler.*][11]

Subsequent cases have sought to limit this test. *Goldberg v. Curhan*[12] held that counsel fees incurred by the plaintiff due to the wrongful conduct of the defendant are not recoverable in the very action brought by the plaintiff to redress his wrong.[13] *Malloy,* the Court stated, was to be regarded as "exceptional." Final disapproval of *Malloy* was expresed by the Court in *Chartrand v. Riley,*[14] where it overruled three earlier decisions applying the *Malloy* test.[15] In an earlier action, the plaintiff, Chartrand, had successfully prosecuted mandamus proceedings to compel the registrar of motor vehicles to reinstate him as an employee.[16] In the *Riley* action, he sought to recover the counsel fees previously expended. On appeal, the Court disallowed a jury verdict for the plaintiff, stating that "[t]axable costs are deemed full compensation to the prevailing party for the expense of conducting litigation, even though in fact such costs do not cover his legal or other expense."[17] Recognizing the necessity for a different rule in malicious prosecution cases such as *Wheeler,* the Court found the *Malloy* rule much too broad for retention. Except for the area of malicious prosecution, the opinion does not detail the occasions when a plaintiff can collect counsel fees.[18] After *Chartrand,* the law in Massachusetts was left in confusion.

Roach may be construed as an attempt to clarify the law. The test it used is similar to that of Section 914 of Restatement of Torts Second, which provides:

> A person who through the tort of another has been required to act in the prosecution of his interests by bringing or defending an action against a third party is entitled to recover compensa-

11 Id. at 385, 191 N.E. at 665.

12 332 Mass. 310, 124 N.E.2d 926 (1955).

13 Id. at 312, 124 N.E.2d at 927.

14 354 Mass. 242, 237 N.E.2d 10.

15 See note 8 *supra.*

16 Chartrand v. Registrar of Motor Vehicles, 347 Mass. 470, 198 N.E.2d 425 (1964).

17 Chartrand v. Riley, 354 Mass. at 243-244, 237 N.E.2d at 11. This is, of course, a fiction. The costs do not come near to covering the expenses.

18 Other cases wherein attorney's fees are collectible still stand. See Spilene v. Corey, 323 Mass. 673, 84 N.E.2d 5 (1949); Potter Press v. C. W. Potter, Inc., 303 Mass. 485, 22 N.E.2d 68 (1939); Boston & Albany R.R. v. Richardson, 135 Mass. 473 (1883).

tion for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred.[19]

This section was referred to in the California case which the Court so approvingly cited.[20] Under this rule counsel fees may be recovered only where they are expended in actions brought by or against third parties. Moreover, as *Goldberg v. Curhan* holds, the plaintiff may not recover counsel fees expended in the very action brought to redress his wrong. This is true even if there is a joinder or consolidation of actions since the *Roach* Court remanded the case to determine the amount of counsel fees incurred solely in prosecuting the claim against the third party.

§1.7. Negligence: Causation: Public carriers. The judicial barriers to tort recovery against the Massachusetts Bay Transportation Authority for negligent operation of a street car have been outlined in *Berger v. Massachusetts Bay Transportation Authority*.[1] Plaintiff there alleged that she boarded a car and rested her hand on the coin box. The car "started off with a jerk" and "she was jerked all around the place; she grabbed onto an upright post with her right hand and bumped her head against the post; before she knew it the car came to a stop with a jerk, causing her to be thrown in a different direction 'back and forth' but she did not lose her grip on the post."[2]

Following the denial of defendant's motion for a directed verdict, the jury found for plaintiff. The Supreme Judicial Court sustained defendant's exception to the denial of its motion. The Court interpreted plaintiff's allegations as setting forth two separate claims: negligence in starting, and negligence in stopping. In reference to the first claim, the Court noted that a plaintiff must show negligence either by direct evidence of what the operator did or by evidence that the jerk was "unusual or beyond common experience," that is, that it was "of extraordinary force."[3] The Court then noted that plaintiff had not introduced any direct evidence of what the operator had done, and found as a matter of law that the jolt, as plaintiff had described it, was not unusual or extraordinary. To illustrate the requirement of a showing of extraordinary force, the Court cited *Nolan v. Newton Street Ry.*,[4] where the successful plaintiff testified that the car had started up with such a velocity that it had appeared the car was "going to stand right up." Even if plaintiff had been more imaginative in her testimony, her claim of negligence in starting would have been barred by the firm grip defense, which, in the

19 4 Restatement of Torts Second §914.

20 See also 15 Am. Jur. Damages §144, at 552 (1938); 25 C.J.S. Damages §50, at 534 (1941).

§1.7. 1 1969 Mass. Adv. Sh. 657, 246 N.E.2d 665.

2 Id. at 657, 246 N.E.2d at 666.

3 Id. at 658, 246 N.E.2d at 666.

4 206 Mass. 384, 92 N.E. 505 (1910).

language of the Court, means that "verdicts are properly ordered for the defendant carrier where the grip of the passenger is not firm and is broken by a jerk."[5] In the instant case, of course, the plaintiff did not show that at the starting of the car she had had a firm grip on anything, and recovery was therefore denied.

Although the firm grip defense is easily rebutted, such is not the case with the barrier to plaintiff's claim of negligence in the stopping of the car. In order to go to the jury on a claim of negligent stopping of a street car, plaintiff has the burden of showing that "the stop was *not caused* by an impending collision or some condition of traffic requiring it."[6] (Emphasis added.) Plaintiff in *Berger* failed to introduce any evidence of observation of "possible obstacles in the path of the car," probably because at the time of the stopping she was being thrown about. In a negligence action, the placing of a burden of proof of a "negative fact" upon a party who is very unlikely to have knowledge of that fact indicates a judicial policy disfavoring recovery by that party. The Court's decision in *Berger,* it would seem, is indicative of a policy against allowing recovery for negligence from a public carrier.

§1.8. Negligence: Foreseeability. The foreseeability of irrational behavior was recently examined by the Supreme Judicial Court in *Carey v. New Yorker of Worcester, Inc.,*[1] and by a federal court applying Massachusetts law in *Bannon v. United States.*[2] Plaintiff in *Carey,* a patron in defendant's tavern, was shot by another of defendant's customers. The assailant, a known "troublemaker" in defendant's bar, was "absolutely drunk" at the time of the shooting and had been boisterously staggering about the premises prior to the shooting.[3] Plaintiff brought an action in tort against the operator of the tavern, arguing that it had been negligent in fulfilling its duty to prevent injury by third parties to paying patrons. Judgment was entered for plaintiff upon a jury verdict, and defendant's exception to the denial of its motion for directed verdict was overruled by the Supreme Judicial Court. The Court held that the jury could have found the defendant to have been negligent in not stopping the assailant's drunken staggerings or failing in some other way to provide for the patrons' safety.

In response to defendant's argument that the shooting was not foreseeable, the Court said the defendant's agents should have realized that the assailant's activities constituted a danger to others, and further, that it was reasonably foreseeable that a shooting would occur. In this regard, the Court stated that serving hard liquor to one already drunk "has a consequence which is not open to successful

5 1969 Mass. Adv. Sh. at 658, 246 N.E.2d at 667.
6 Id. at 659, 246 N.E.2d at 667.

§1.8. 1 1969 Mass. Adv. Sh. 391, 245 N.E.2d 420.
2 293 F. Supp. 1050 (D.R.I. 1968).
3 1969 Mass. Adv. Sh. at 392, 245 N.E.2d at 422.

dispute [and] may well make the individual unreasonably aggressive, and enhance a condition in which it is foreseeable that almost any irrational act is foreseeable."[4] Although this strong language suggests that a Massachusetts tavern owner is, in effect, an insurer of the safety of all customers who may be injured as a result of irrational behavior of drunken patrons, such language must be read in light of the Court's treatment of *Addison v. Green Cafe, Inc.*[5]

In *Addison,* the plaintiff, a customer in the defendant's tavern, was shot by another patron. An argument had erupted among several customers, and while the defendant's employees were trying to quiet the men and summon a police officer employed by the defendant, another customer, who was uninvolved in the altercation and who was seated some distance away, began shooting wildly. This customer fired four or five shots, one of which wounded the plaintiff. The plaintiff sued the tavern owner in tort, claiming that her personal injuries were suffered as a result of the defendant's negligence. The jury returned a verdict for the plaintiff, but the judge, on leave reserved, entered judgment for the defendant. The Supreme Judicial Court affirmed on the ground that the plaintiff's injuries were not caused by any action of the defendant. The shooting was independent of any negligence of the defendant and was not the consequence of any act for which the defendant was responsible. The customer who fired the shots was, therefore, an intervening cause, and as such, broke any causal connection which may have existed beforehand between the defendant's actions and the plaintiff's injury. The opinion made no mention of the state of sobriety of the assailant, and it was not indicated whether drunkenness could have caused his actions.

The *Carey* Court distinguishes *Addison* on the sole ground that the assailant in that case was not a party to the scuffle. *Addison* could also have been distinguished on the ground that the defendant tavern keeper in that case was not negligent since he had employed a police officer and his employees had attempted to settle the disturbance. The *Carey* defendant took no action despite earlier disturbances. A distinction could also have been drawn on the ground that there was no showing in *Addison* that the assailant, although drunk, had been served by the defendant at any time; it was shown in *Carey* that the assailant had been served. Instead of drawing these factual distinctions, the court distinguished the two cases on the basis of the Restatement of Torts Second, which states that even though a third party's negligent act may not prevent the defendant's conduct from being a legal cause, "the negligence of the act may be so great or the third person's conduct so reckless as to make it appear an extraordinary response to the situation created by the actor and therefore a superseding cause of the other's harm."[6]

4 Id. at 393, 245 N.E.2d at 422.
5 323 Mass. 620, 84 N.E.2d 33 (1949).
6 2 Restatement of Torts Second §447, Comment *g*.

A problem arises since the *Carey* Court fails to distinguish *Addison* on the ground that it was not shown whether the assailant was served when drunk. If the assailant were so served, the *Carey* language makes any irrational act foreseeable and thus not extraordinary. The court in *Carey* should either have distinguished *Addison* on the factual grounds referred to above or else clearly have held that in any cases where the defendant serves a drunken customer, the customer's actions can never be a superseding cause. Since *Addison* was distinguished only on the basis that the assailant in *Addison* was not a participant in the scuffle, it is unclear how the court will resolve a case with a fact pattern similar to *Addison,* but in which appears an additional showing that the defendant had served an already drunken assailant.

The plaintiff in *Bannon* brought an action under the Federal Tort Claims Act as administratrix of Russell Bannon, alleging that the negligence of defendant's Veteran's Hospital had caused Bannon's self-inflicted death. The decedent had been a patient at the Veteran's Hospital in Brockton, Massachusetts, and was being treated by the hospital for mental illness at the time of his death. He had full freedom of movement at the hospital, and was required only to report each morning for therapy class and to be present each night for a bed check at 9:30 P.M. On the day in question the decedent was discovered missing at the time of the bed check and the police were notified. Sometime in the afternoon of that same day he had left the hospital and entered a gun shop in Providence, Rhode Island. While the clerk was in the rear of the shop, the decedent shot himself in the head.

Plaintiff alleged liability under the Massachusetts death statute,[7] on the ground that the hospital had been negligent in its care, supervision and management of the decedent, and that such negligence had been the proximate cause of the suicide. Plaintiff introduced expert testimony that the patient had not been under proper hospital supervision and that there had been improper delays in discovering his elopement and in mounting attempts to locate him. Plaintiff also introduced additional evidence of repeated suicidal threats, assaultive behavior, drinking episodes while on other elopements from the hospital, the purchase of guns and the carrying of knives by deceased. The Court found as a matter of fact that the care given to the decedent had been commensurate with the care given by other hospitals, that the medical records pertaining to the decedent had been adequately kept, that the rules governing the decedent's freedom of movement had been warranted, and that it could not have been anticipated as likely that the decedent would commit suicide.

Plaintiff argued that neither "anticipation" nor "comparable care" is a part of Massachusetts law. Under plaintiff's theory, the question was simply "whether the hospital was negligent in its care, supervision

[7] G.L., c. 229, §2.

and management of the patient and whether such negligence was the proximate cause of the injuries sustained."[8] Defendant, on the other hand, contended that a hospital's duty to exercise reasonable care for its patients is limited "by the rule that no one is required to guard against or take measures to avert that which a reasonably prudent person under the circumstances would not anticipate as likely to happen."[9] In rejecting plaintiff's argument the court held that "the Massachusetts Supreme Court, if confronted with the question as to the measure of care a hospital must exercise in caring for mentally ill persons relative to suicide, would employ the foreseeability limitation. . . ."[10] In finding that the suicide was not foreseeable, the court stated that on the basis of all the evidence, it could be inferred that it was foreseeable that deceased might elope, get drunk, or act irrationally and with excitability. There was, however, no legally sufficient evidence that the deceased had ever attempted to commit suicide or that his previous behavior indicated that the hospital should have anticipated suicide. The evidence that deceased had threatened suicide was deemed insufficient to sustain a finding that suicide was foreseeable since it is "quite universal" for patients to threaten suicide. It would seem that the finding of the court is, in effect, a holding that the specific act of suicide must be foreseen rather than irrational or destructive behavior in general and that, as a matter of law, suicide is not foreseeable unless there has been a previous suicidal attempt.

The projections by the *Bannon* court as to how the Massachusetts Supreme Court would hold on this issue seem particularly narrow in light of the Court's statement in *Carey* that the mere serving of liquor to an inebriate may "enhance a condition in which it is foreseeable that almost any irrational act is foreseeable." The *Carey* decision in effect broadened the concept of foreseeability since only the likelihood of irrational behavior and not the specific action by the patron need be foreseen. The *Bannon* court applied a narrower theory and held that the specific act of suicide rather than irrational behavior must be foreseeable. *Bannon* was, of course, concerned with suicide, a contingency which is, by its nature, perhaps less foreseeable than injury to a third party.[11] If in *Carey* the drunken patron had committed suicide, the Court might have held that the suicide could not have been foreseen.[12] If the Court would not have so held, the *Bannon* court is in the strange position of imposing on mental hos-

8 Bannon v. United States, 293 F. Supp. at 1054.

9 Ibid.

10 Id. at 1055.

11 This may be questionable in the Bannon fact pattern since the Court mentions that suicide threats are common among mental patients.

12 In a suicide case, the patron's estate would have difficulty recovering because of the probability of contributory negligence on the part of the deceased. This issue would be more likely to arise when comparative negligence becomes effective. See Chapter 2 *infra*.

pitals a duty toward their patients that is less stringent than that imposed on tavern owners toward their customers.

§1.9. Negligence: Foreseeability; Assumption of the risk. In a more humorous vein, the Supreme Judicial Court has issued a stern warning to those who would choose to enter upon a crowded dance floor that they do so at their own risk. Henceforth, the courts of the Commonwealth will be closed to those who are injured as a result of being "bumped" by others while dancing in an overcrowded hall. Such is the effect of the court's decision in *Goggin v. New State Ballroom.*[1] While *waltzing* to cha cha or jitterbug music, plaintiff, who had paid a fee to enter defendant dance hall, was knocked to the floor by another of defendant's customers. Plaintiff brought an action in tort claiming the status of an invitee injured by reason of defendant's negligent failure to operate an orderly dance hall. Verdict was for plaintiff, following a denial of defendant's motion for a directed verdict. The Supreme Judicial Court reversed, holding that where dangerous conditions are "open and obvious" a dance hall operator is under no duty to warn his customers even when a substantial crowd has gathered. Since dance hall proprietors are not insurers of the safety of their patrons, their liability, if any, must arise from their knowledge — or the fact that in the exercise of reasonable care they should have known or anticipated — that disorderly actions of third parties might lead to injury to other patrons. In this regard, the Court stated that although "the bump which floored the plaintiff may have been deliberate [it] was, in our view, not such a happening that the defendant was bound to anticipate it."[2]

The first ground of decision mentioned by the Court seems to be an application of the doctrine of assumption of the risk, while the second is apparently a holding that because the manner in which the plaintiff was injured was not foreseeable, defendant is not liable. The plaintiff seems to be caught in a paradox. On the one hand, the defendant had no duty to warn the plaintiff since the dangerous conditions existing in the dance hall were "open and obvious," while on the other hand, the bump which "floored" plaintiff was so unusual that defendant was not bound to anticipate it. The impact of this decision on the dance is not presently clear. Though the Court stated that the "vagaries of fashions in the dance and their consequences are better left subject to the judgment of those who engage in them . . . ,"[3] it is arguable that the denial of recovery in *Goggin* may have a chilling effect on the more active forms of dance now prevalent.

§1.10. Negligence: Violation of statute or ordinance. In *Stimpson v. Wellington Service Corp.*,[1] the Supreme Judicial Court held

§1.9. [1] 1969 Mass. Adv. Sh. 683, 247 N.E.2d 350.
[2] Id. at 685, 247 N.E.2d at 352.
[3] Ibid.

§1.10. [1] 1969 Mass. Adv. Sh. 645, 246 N.E.2d 801.

that violation of a statute requiring vehicles weighing in excess of 14 tons to obtain a permit prior to operation of the vehicle over public ways may be found the proximate cause of the breaking of a subsurface water pipe.

Plaintiff owned and occupied a building at Albany Street in Cambridge. Sometime after 4:30 P.M. on July 10, 1962, a break occurred in a cast iron water pipe located just inside the basement wall of plaintiff's building. Plaintiff brought an action in tort against defendant, alleging that the break had been caused by the operation by defendant on Albany Street on the morning of July 10, 1962, of a tractor trailer rig carrying a load of 85 tons. The basement pipe was connected to the city water main by a pipe which was located under Albany Street. Plaintiff sought unsuccessfully to introduce testimony of an expert engineer, which testimony would have tended to show that compression of the subsoil of the street would bend downward the connecting pipe, thereby causing severe strain to be put on the basement pipe. The evidence did show that on the morning of July 10th defendant had been maneuvering the tractor trailer rig with its excess load on Albany Street and that, at one point, the trailer had fallen to the ground. It was also shown that defendant, in contravention of G.L., c. 85, §30, had failed to obtain a permit from Cambridge to operate the overweight vehicle on the city's streets.

Verdict was for plaintiff. The judge reserved leave to enter a verdict for defendant and reported to the Supreme Judicial Court for decision the question of whether the violation of the statute was a proximate cause of the break. The question was answered affirmatively, although the primary purpose of the statute was to protect the roadways themselves from injury due to overloaded vehicles. The Court reasoned, "the Cambridge authorities in considering an application for a permit under the statute should have weighed" other possible effects of granting a permit.[2] Because defendant failed to apply for a permit, the Cambridge authorities were not given an opportunity to appraise the risks and either to refuse the permit altogether or impose conditions upon its exercise. Defendant knew that the delivery would require maneuvering great weights on Albany Street, and further, that this might affect underground installations. Failure to apply for a permit "was a failure to exercise due care as to those who might be injured if the load was in fact so heavy as to cause a break and resulting damage."[3]

The Court's decision rests upon its belief that the Cambridge authorities might have denied defendant's application for a permit, thereby preventing the break, or have imposed conditions which would have protected persons against such damage as plaintiff suffered. To support its decision, the Court cited the prohibition of an existing Cambridge ordinance against moving over Cambridge streets vehicles

[2] Id. at 648, 246 N.E.2d at 805.
[3] Id. at 649, 246 N.E.2d at 805.

so loaded as to be likely to injure property.[4] In apparent further support for its conclusion that the failure to apply for a permit was in itself negligence, the Court reported that the state, in issuing a permit to defendant to use state highways, had required that all structures below and above ground shall be protected from injury, and that defendant "shall be responsible for all damages to persons or property due to or resulting from any work done" under the permit.[5]

Although the Cambridge authorities "should" perhaps have considered the possibility of subsurface damage, the ordinance cited by the Court gives no indication that such consideration was necessary or even likely to have been given. The ordinance speaks only of damage to "property." Moreover, the Court did not base its finding of negligence on the Cambridge ordinance but rather on the statute which provides that persons who operate a vehicle in violation of the statute "shall be liable in tort to the body politic or corporate having charge of the way for injury to the way thereby caused."[6] There can be no doubt, as the Court indicated, that the statute was designed to protect the roadways themselves from injury; it expressly creates tort liability for soil injury. However, any recovery based on the statute for injuries to property other than roadways must be by implication. In deciding whether the violation of a statute gives rise to liability by implication, it is fundamental that liability should be implied only for invasion of those interests which the statute is designed to protect. The Court in *Stimpson* made no attempt to argue that in enacting the statute the legislature intended to protect property other than roadways. The Court asserted only that the Cambridge authorities "should have" considered the possibility of injury to property other than roadways. The opinion and its rationale are thus confusing.

§1.11. Negligence: Landlord and tenant. In *Dolan v. Suffolk Franklin Savings Bank*,[1] the Supreme Judicial Court, reluctant to overrule an earlier line of cases, attempted to distinguish them from the case at hand. The result thus reached is particularly interesting since it now appears that the landlord owes a stricter duty of care to maintain in reasonably safe condition areas other than the common areas of a building.

It is still the general rule in Massachusetts that a landlord owes only the duty to keep common areas of the building in as good a condition as they were, or appeared to be, at the time the tenancy began. In areas other than common areas, the landlord now owes a duty to keep the premises in a reasonably safe condition. Furthermore, violation of a safety ordinance is evidence of negligence in all areas controlled by the landlord except the common areas.

[4] Id. at 648, 246 N.E.2d at 804.
[5] Id. at 648-649 n.2, 246 N.E.2d at 805 n.2.
[6] G.L., c. 85, §30.

§1.11. [1] 1969 Mass. Adv. Sh. 623, 246 N.E.2d 798. For further discussion of the Dolan case see Chapter 5 *infra*.

In *Dolan*, plaintiff suffered personal injuries and property damage in a fire and explosion which occurred in a first floor restaurant located in defendant bank's apartment house. Plaintiff brought an action against the bank alleging violation of Section 1008(a) of the Building Code of the City of Boston in that there were no sprinklers in defendant's building and that the occupation of the premises by a restaurant using gas cooking facilities had been forbidden by the Appeal Board of the City of Boston. The appeal board had granted a prior owner's request that the building be exempted from Section 1008(a) on the condition that the use of the first floor as a restaurant be terminated. The lower court excluded plaintiff's offer of evidence of the Section 1008(a) violation and granted defendant bank's motion for a directed verdict. In support of the lower court's evidenciary ruling, the bank cited a line of cases ending with *Stapleton v. Cohen*,[2] which held that violation of a safety provision by a landlord is neither a ground of civil liability nor evidence of negligence. Rather than overruling this line of cases the Court limited its holdings "to situations where common areas are involved."[3]

The Court made no attempt to set forth a rationale for its distinction. Indeed it is doubtful that a convincing rationale could be propounded. The Court did purport to find a basis for its holding in prior case law. The Court cited *Wynn v. Sullivan*,[4] where it was stated that a violation of a statute would have been evidence of negligence if defendant had owed a duty of care to the plaintiff in the case, who was a bare licensee. The Court quoted language in *Wainwright v. Jackson*[5] which, by implication, indicates that a landlord has a duty to use due care in maintaining an apartment building in a reasonably safe condition. Therefore, argued the Court, since there is a duty to use care, violation of a safety statute is admissible as evidence of negligence. Though the Court strained to construct a precedential basis for limiting its decision to non-common areas, it is doubtful that the *Stapleton* line of cases will survive the onslaught of future litigation.

§1.12. Malicious prosecution. Some interesting malicious prosecution issues were presented in *Jacova v. Widett*.[1] The defendant had caused the plaintiff to be prosecuted for the crimes of larceny and forgery stemming from the same alleged underlying facts. Plaintiff was convicted of both crimes in the Municipal Court for the City of Boston at a trial where the defendant was the only prosecution witness. On appeal, plaintiff was acquitted of the larceny charge on verdict

2 Stapleton v. Cohen, 353 Mass. 53, 228 N.E.2d 64 (1967); Campbell v. Romanos, 346 Mass. 361, 191 N.E.2d 764 (1963); Richmond v. Warren Institution for Savings, 307 Mass. 483, 30 N.E.2d 407 (1940).

3 Dolan v. Suffolk Franklin Savings Bank, 1969 Mass. Adv. Sh. at 626, 246 N.E.2d at 800.

4 294 Mass. 562, 3 N.E.2d 236 (1936).

5 291 Mass. 100, 195 N.E. 896 (1935).

§1.12. 1 1969 Mass. Adv. Sh. 185, 244 N.E.2d 580.

directed by the superior court. Apparently because the municipal court lacked felony jurisdiction over the forgery court, no appeal was taken from this conviction. Alleging that the convictions had been obtained only and solely upon the false testimony of the defendant, induced by his desire to force the plaintiff into releasing civil claims against him, the plaintiff sued for malicious prosecution. Jury verdicts were returned for the plaintiff following the overruling of defendant's demurrer, the refusal to grant his requests for instructions, and the denial of his motions for directed verdict and a new trial.

Ordinarily, a plaintiff is unable to sustain his burden of proving that the criminal charges were instituted against him without probable cause when he has been convicted in the tribunal to which complaint was made. Indeed, the general rule is that a conviction, even though reversed on appeal, "is conclusive proof of probable cause [unless it] was obtained solely by false testimony of the defendant [or is] impeached on some ground recognized by the law, such as fraud, conspiracy, perjury or subornation of perjury as its sole foundation."[2] In filing his demurrer and motion for directed verdict, the defendant argued that plaintiff had not sustained his burden because the convictions had followed not only his testimony but also the testimony of plaintiff and two other witnesses. In upholding the trial court, the Supreme Judicial Court found the testimony of plaintiff and his supporting witnesses had been directed to minimal points and ruled that it "did not preclude a decision that the conviction was obtained solely upon the false testimony of the defendant."[3] Distinguishing prior cases,[4] the Court stated it

> . . . has never said that the defendant charged with crime in a district court is in the dilemma of exercising his right to testify in his own defense at the peril of renouncing another right at a later trial to impeach the conviction for improper conduct of the complainant, and thus to demonstrate that the finding of guilt of the judge is entitled to no independent value.[5]

The trial court ruled that the forgery conviction was not conclusive proof of the existence of probable cause because the municipal court had lacked jurisdiction over the crime, and further instructed the jury that the issue remained one for its determination based upon all the evidence. Approving this charge, the Supreme Judicial Court also

[2] Id. at 186, 244 N.E.2d at 582, citing Magaletta v. Millard, 346 Mass. 591, 596, 195 N.E.2d 324, 326 (1964); Broussard v. Great Atl. & Pac. Tea Co., 324 Mass. 323, 326, 86 N.E.2d 439, 440 (1949); Dunn v. E. E. Gray Co., 254 Mass. 202, 203-204, 150 N.E.2d 166, 167 (1926); Wingersky v. E. E. Gray Co., 254 Mass. 198, 201, 150 N.E. 164, 165 (1926).

[3] Dolan v. Suffolk Franklin Savings Bank, 1969 Mass. Adv. Sh. at 188, 244 N.E.2d at 583.

[4] Carere v. F. W. Woolworth Co., 259 Mass. 238, 156 N.E.2d 55 (1927); Dennehey v. Woodsum, 100 Mass. 195 (1868).

[5] Dolan v. Suffolk Franklin Savings Bank, 1969 Mass. Adv. Sh. at 190, 244 N.E.2d at 584.

held it to be immaterial that the municipal court judge should have bound the plaintiff over to the grand jury if he were satisfied of the existence of probable cause of plaintiff's guilt, since in fact the judge did not do so.

In another case, *Smith v. Eliot Savings Bank*,[6] the Supreme Judicial Court held that it was improper to direct a verdict for the defendant in a malicious prosecution action based on the complaints of a bank teller charging the plaintiff with the crimes of forgery, uttering and larceny, which complaints were made seven months after the teller had handled a single bank transaction which lasted only a matter of minutes. The identification was made under circumstances which were less than ideal since the teller had accompanied the police at the interrogation of the plaintiff. In remanding the case, the Court said, "the jury could have found that the identification was so suspect that 'a man of ordinary caution and prudence' would not have relied upon it."[7] Over the bank's objection, the Court held the bank responsible for the teller's action. The plaintiff had established more than a mere employer-employee relationship and was not relying solely upon the "ostensible scope" of the employee's authority. The bank's treasurer had known about the unlawful withdrawals and, on at least three occasions, had discussed them together with police detectives and the teller. On the day of the identification, the treasurer gave the teller permission to accompany a detective, knowing that they were going on business which concerned the bank and that there was talk about a prosecution to be initiated. Against this background, the Court felt the jury reasonably could have found authority in the teller to sign the criminal complaints on the bank's behalf.

B. Legislation

§1.13. Medicial immunity: Practical nurses. The legislature has again amended the good samaritan statute.[1] As originally enacted in 1962, the statute provided that any licensed physician who, in good faith, rendered emergency care or treatment at the scene of a motor vehicle accident was exempt from civil liability for any acts or omissions on his part and for expenses incurred by hospitals when he ordered a person hospitalized or caused his admission.[2] Two years later this protection was extended to physicians residing in other states and duly registered therein.[3] The following year, licensed physicians living in the District of Columbia and in Canada were also covered.[4] At the same time, the limitation confining the protection to

6 1969 Mass. Adv. Sh. 499, 246 N.E.2d 437.
7 Id. at 503, 246 N.E.2d at 440.

§1.13. 1 G.L., c. 112, §12B.
2 Acts of 1962, c. 217.
3 Acts of 1964, c. 59. In 1965, licensed physicians residing in the District of Columbia and in Canada were also covered.
4 Acts of 1965, c. 578.

motor vehicle accidents was deleted and the immunity extended to any physician "who, in good faith, as a volunteer and without fee, renders emergency care or treatment, other than in the ordinary course of his practice."[5] Licensed registered nurses were first covered by the statute in 1967[6] and its provisions have now been extended to include protection of licensed practical nurses.[7]

§1.14. **Torts by minors: Parental responsibility.** A new law now imposes vicarious liability upon parents for certain torts of their minor children. Section 85G, which has been added to Chapter 231[1] of the General Laws, provides,

> Parents of an unemancipated child under the age of seventeen and over the age of seven years shall be liable in a civil action for any wilful act committed by said child which results in injury or death to another person or damage to the property of another.

It further provides that the liability shall not exceed $300 and does not extend to parents who, as a result of a judicial decree, do not have custody of their child at the time of the commission of the tort. This statute raises substantial constitutional issues since the $300 limitation indicates that it is punitive, not compensatory, in nature, and that custody of the child, not fault of the parent, is the basis of parental liability.

§1.15. **Conversion: Return of leased personalty.** Another amendment to Chapter 231 of the General Laws adds a new Section 85H, which provides,

> . . . failure to return any personal property acquired by a person under a lease or contract of hire or rental . . . within thirty days after notice in writing of the termination . . . shall create a presumption that said person converted such property to his own use.[1]

The termination notice must be delivered in hand by a sheriff or constable or sent by registered mail to the possessor of the property.

§1.16. **Nuisance.** General Laws, c. 91, §59A,[1] permits the recovery of double damages from any person who negligently pumps or discharges petroleum products or bilge water into waterways or tidal

[5] Ibid.

[6] Acts of 1967, c. 374. During the same session, the legislature also inserted a new §12C to G.L., c. 112, which exempts physicians and nurses "administering immunization or other protective programs under public health programs" from civil liability "as a result of any act or omission on his part in carrying out his duties." Acts of 1967, c. 509.

[7] Acts of 1969, c. 343.

§1.14. [1] Acts of 1969, c. 453.

§1.15. [1] Acts of 1969, c. 467.

§1.16. [1] Inserted by Acts of 1967, c. 507.

flats so as to cause injury to the property of another. Chapter 373 of the Acts of 1969 exempts from the operation of this section injury caused by the spraying of pesticides on an area declared to be a breeding place of mosquitoes or other insects by appropriate state or local authorities provided the use conforms to the rules and regulations promulgated by the pesticide board.

§1.17. Unfair competition: Trade secrets. Chapter 93 of the General Laws has been amended by the insertion of a new Section 42A, providing injunctive relief for the misappropriation of trade secrets, "including orders or decrees restraining and enjoining the respondent from taking, receiving, concealing, assigning, transferring, leasing, pledging, copying or otherwise using or disposing of a trade secret, regardless of value."[1]

C. Student Comment

§1.18. Master-servant relationship: The right of control: Konick v. Berke, Moore Co.[1] Berke, Moore Company was the employer of an individual whose privately owned vehicle struck and injured the plaintiffs. At the time of the accident, the employee was a salaried timekeeper at a construction site in Chelsea at which the employer was the general contractor. When the employee was instructed to "jump in the car and get the payroll" from the company office in Boston, he used his own automobile, and while en route to the company office, struck the plaintiffs, two minors.[2] The plaintiffs brought an action in tort against both the employee and the employer, charging that the employer was liable for the torts of his employee under the doctrine of respondeat superior. The trial court granted the defendant employer's motion for a directed verdict, basing its decision on the Massachusetts rule that no liability is imposed on an employer through the doctrine of respondeat superior when he had no right to control the method and manner in which the employee conducted himself at the time of the accident.[3]

The plaintiffs appealed. In reversing the lower court and ordering a new trial, the Supreme Judicial Court HELD: The master-servant relationship could exist and result in employer liability even though the employer had no right to control the manner and means of the operation of the vehicle by his employee, as long as the employee was acting within the scope of his employment.

The decision is a significant departure from the rule laid down in a series of Massachusetts decisions which had held that the crucial test in determining the existence of the master-servant relationship was the right of the employer to control the details of the operation of the

§1.17. [1] Acts of 1969, c. 457.

§1.18. [1] 1969 Mass. Adv. Sh. 405, 245 N.E.2d 750.
[2] Id. at 406, 245 N.E.2d at 751.
[3] Id. at 408, 245 N.E.2d at 752.

vehicle, including the route and speed of the vehicle and the employee's mode of driving.[4] This test had its inception in the case of *Pyyny v. Loose-Wiles Biscuit Co.*[5] In *Pyyny,* a traveling salesman was involved in an automobile collision. The injured party sought recovery against the employer of the salesman, and in his argument, suggested that since the employer had the right to control the salesman, a master-servant relationship existed, thereby making him liable under the doctrine of respondeat superior. The employer denied that he ever had the right to control the salesman. He claimed that the salesman had purchased and registered the vehicle in his own name and had obtained a license to operate it on his own initiative without any requirement that he do so by the employer. Since the vehicle was the salesman's property and since the license to operate it created a relationship between the salesman and the Commonwealth, the employer contended that he had no right to control the purpose for which the car was used. He also alleged that because he was under no obligation to make any repairs on the salesman's vehicle, he had no rights, interests, duties or obligations toward it.[6] Finally, he argued that he had no means of control over the salesman, since the salesman had no regular work hours and could solicit orders at his own convenience anywhere within a designated territory.[7] The Court was persuaded by these arguments and found that, since the employer had neither the right to control the salesman's automobile nor the right to control the use of it by the salesman, the master-servant relationship did not exist, and the employer could not be held liable under the doctrine of respondeat superior.

In the next major case, *Khoury v. Edison Electric Illuminating Co.,*[8] the defendant employer denied liability for injuries caused by an employee and argued that because the employee used his own vehicle at his own election and convenience, the employer had no right to control the manner in which the employee used the vehicle, and therefore, he should not be held liable for any injuries caused by the employee. As evidence of his lack of control, the employer introduced arguments similar to those found in *Pyyny.* For example, the employer stated that:

> . . . It was the duty of Parnell [the employee] to register his automobile and to obtain a license to operate it. The defendant [employer] did not require or request Parnell to use his automobile in the business. . . .[9]

The Court also noted that: "The defendant assumed no obligation

[4] Gladney v. Holland Furnace Co., 336 Mass. 366, 145 N.E.2d 694 (1957); Hailer v. American Tool & Machine Co., 288 Mass. 66, 192 N.E. 315 (1934).
[5] 253 Mass. 574, 149 N.E. 541 (1925).
[6] Id. at 576, 149 N.E. at 542.
[7] Id. at 575, 149 N.E. at 542.
[8] 265 Mass. 236, 164 N.E. 77 (1928).
[9] Id. at 239, 164 N.E. at 78.

to keep the auto in repair; that duty rested upon Parnell, its owner."[10] The evidence was again persuasive, and the Court decided not to impose liability on the employer, basing its decision on the premise that the vehicle was the property of the employee and that the employer had neither rights, interests, duties or obligations in the property, nor the right to control its use by the employee.[11]

Wescott v. Henshaw Motor Co.[12] represented a change of emphasis. In *Wescott,* the Court again recognized the private property argument but went on to say that:

> [i]t [the vehicle] was under the control of Young [the employee] and the defendant [employer] had no power to control *the way in which it was to be operated.* The defendant had no right to direct the employee Young in any particular way he should go, the course he should go, the course he should take, the speed of the vehicle, or his mode of driving the automobile. [Emphasis added.][13]

This statement was significant because it represented a distinction in the type of evidence necessary to show a lack of control by the employer. While in *Pyyny* and *Khoury* it was sufficient to show that an employer had no duties or obligations to repair or maintain the vehicle in order to establish the employer's lack of control, the *Wescott* Court relied on this lack of employer control over the details of the automobile's operation to relieve the employer of liability.

The Court continued to follow the *Wescott* formula in *Hailer v. American Tool & Machine Co.*[14] and *Gladney v. Holland Furnace Co.*[15] by concerning itself with the failure of employers to instruct their employees in the operating details of their vehicles, including the speed, route and mode of operation to be used. This continued to be the law up to the time of the *Konick* decision.

Against this background of cases, the decision in *Konick* is a decisive departure from precedent because the specific evidentiary test used to determine whether an employer had the right to control an employee is discarded. An examination of the failings of the test should make the policy basis of *Konick* clear.

The first inadequacy of requiring the employer to control the details of the operation of the automobile was that this often resulted in the employer not being held liable for injuries which arose from transactions the employer created and from which he stood to benefit. For instance, under the *Pyyny* rule, an employee could always be required to use his own automobile on the business of the employer. Because he was using his own vehicle, liability for any injuries the employee caused fell solely upon the employee, absent control by the employer

[10] Id. at 239, 164 N.E. at 79.
[11] Id. at 240, 164 N.E. at 79.
[12] 275 Mass. 82, 175 N.E. 153 (1931).
[13] Id. at 87, 175 N.E. at 155-156.
[14] 288 Mass. 66, 192 N.E. 315 (1934).
[15] 336 Mass. 366, 145 N.E.2d 694 (1957).

over the "details of operation." By comparison, an employee who used his own vehicle on his employer's business and was told the details of the operation of the vehicle avoided sole liability, and liability was also imposed on the employer. Thus, all the employer had to do in order to avoid liability in all cases was require all employees to use their own vehicles but give no specific instructions as to the method or manner of operation. Indeed, as the Supreme Court of New Jersey stated:

> . . . If that were to be the test, an employer could never be held [liable] except in cases of willful wrong in giving instructions to an employee who later executes such wrongful instructions faithfully.[16]

The origin of this anomalous situation wherein an employer may avoid liability seems to be the historical policy of organized government to encourage and assist business enterprises.[17] The courts have traditionally protected employers and businesses from undue hardships on the ability to do business by insulating them from recoveries arising from the torts of their employees, except in the rigorous and narrow circumstances where the employer had the right to control the details of the employee's activities. This being the case, one must ask whether such motivations have any relevance today when the natures of living and doing business have so markedly changed.

In this respect, the words of the Supreme Court of New Hampshire stand out:

> . . . The argument may be made that the rule established by these [*Pyyny*-type] cases, which is a minority rule, is less satisfactory in its application to modern business than it appeared to be when it was announced about thirty years ago.[18]

If we accept this premise, then the basic policy justification of the

[16] Kohl v. Albert Lifson & Sons, 128 N.J.L. 373, 375, 25 A.2d 925, 927 (1942).

[17] In Massachusetts, employers have traditionally been relieved of liability for injuries to third persons caused by their employees when they have no "control of the manner and means" of the operation of vehicles by employees. This policy was originally applied to accidents involving horses and carriages and was only later applied by analogy to motor vehicles. See Driscoll v. Towle, 181 Mass. 416, 63 N.E. 922 (1902). However, a comment to the Restatement of Agency states:

". . . It is probably true that before the nineteenth century the master was not normally responsible for the uncommanded acts of the servant, at least for those which did not enure to the master's benefit. However, with the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgments and the frailties of those working under his direction and for his benefit. As a result of these considerations, historical and economic, the courts of today have worked out tests which are helpful in predicting whether there is such a relationship between the parties that liability will be imposed upon the employer for the employee's conduct which is in the scope of employment." 1 Restatement of Agency Second §219, Comment *a*.

[18] Ross v. Robert's Express Co., 100 N.H. 98, 102, 120 A.2d 335, 338 (1956).

Pyyny decision is no longer valid, and courts should no longer allow employers and businesses to benefit from this anachronism in the law.

A second failing of the *Pyyny* control test was the fact that employees were held solely liable for injuries sustained by third persons when the risks which resulted in the injuries were primarily incident to the seeking of benefit for the employers. The philosophical problem of holding employees liable in this situation was articulated by Justice Cardozo when he commented:

> . . . Unquestionably injury through collision is a risk of travel on a highway. What concerns us here is whether the risks of travel are also risks of the employment. In that view the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.[19]

Using the logic of this position, it would seem that since the employee has been placed in a position of risk in order to benefit the employer, the risk as well as the benefit should be ascribed to the employer. In other words, the risk of liability for injuries caused by an employee is a risk of doing business rather than a risk of employment, and should fall on the employer, not the employee.

The *Pyyny* test perpetuated this fundamental unfairness toward employees and bestowed a concomitant unjustified privilege upon employers. Viewed in this light, the decision of the Supreme Judicial Court in *Konick,* that it would no longer follow the case law to the extent that it utilized an anachronistic and fundamentally unfair control test, must be viewed as a significant step toward bringing the master-servant relationship out of the 19th century and into the present.

The Court, however, made no attempt to outline the specific tests which it deemed relevant in finding control, but it did refer to cases which "suggest that the crucial question is the right to control the driver's general activities, not the physical control of the car.[20] It never formally accepted this principle as a rule of law, but instead remanded the case for a new trial on the basis of the erroneously directed verdict for the defendant, Berke, Moore Company. Since the Court did not set forth a test, it is necessary to analyze decisions in the majority jurisdictions in order to derive the relevant test.

One of two distinct relationships may be created when one person employs another to render services for him in an area other than contractual dealings with third parties.[21] The first is an employer-em-

19 Matter of Marks v. Gray, 251 N.Y. 90, 93, 167 N.E. 181-182 (1929).

20 1969 Mass. Adv. Sh. at 408, 245 N.E.2d at 752.

21 Both a servant and an independent contractor perform services for an employer which do not relate to representing the employer in contractual dealings with third parties. These situations are distinguished from the situation of the agent, who is a person retained by another called a principal to deal with third parties contractually on behalf of the principal. It is noted that "The word 'em-

ployee or master-servant relationship, and the second is the independent contractor relationship. The primary distinction between these two is that in the employer-employee relationship, the employer has the right to control the details of the employee's performance of services, while the employer of the independent contractor has no such right of control.[22] As a consequence of his right to control an employee, the employer is held liable for the torts of his employee if these torts were committed while the person was acting within the scope of his employment and in the furtherance of his employer's business.[23] Similarly, because the employer has no right to control the actions of the independent contractor, he is generally not held liable for his torts.[24] Control is the key to finding the existence of the employer-employee relationship and the related liability of the employer.

In finding control as the basis of employer liability, the majority of jurisdictions follow the rule referred to in *Konick*: " . . . the crucial question is the right to control the driver's general activities, not the physicial control of the car."[25] One of the jurisdictions which utilizes a general activities basis for liability is Nebraska. In a case in which

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ployee' is commonly used in current statutes [and practice] to indicate the type of person herein described [in the Restatement of Agency] as servant." 1 Restatement of Agency Second §2, Comment *d*.

22 1 Restatement of Agency §§ 2(2) and (3) distinguish between the servant and the independent contractor as follows:

(2) A servant is . . . employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

"(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."

23 "The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally. The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm. It is true that normally one in control of tangible things is not liable without fault. But in the law of master and servant the use of the fiction that 'the act of the servant is the act of the master' has made it seem fair to subject the nonfaulty employer to liability for the negligent and other faulty conduct of his servants." 1 Restatement of Agency Second §219, Comment *a*.

See Hackett, Why Is a Master Liable for the Tort of His Servant, 7 Harv. L. Rev. 107 (1893); Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105 (1916); Douglas, Vicarious Liability and Administration of Risk, 38 Yale L.J. 584 (1929); Morris, The Torts of an Independent Contractor, 29 Ill. L. Rev. 339 (1934).

24 Noting that "the assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm," under the Restatement definition of independent contractor as one "who is not controlled by the other nor is subject to the other's right of control," there is no basis for imposing tort liability on the employer for the torts of the independent contractor.

25 Konick v. Berke, Moore Co., 1969 Mass. Adv. Sh. at 408, 245 N.E.2d at 752.

a traveling salesman was found to be an employee and not an independent contractor, the Supreme Court of Nebraska stated:

> . . . It seems to us that the control of the automobile is not the dominant feature. It is a question of the control of the driver of the automobile by the employer, as distinguished from the physical control of the car that to us seems the more important factor. We believe the proper rule to be as follows: Where an employer expressly or impliedly authorizes the use of an automobile owned by an employee in the pursuit of his duties, the employer is liable to innocent third persons for injuries resulting from its negligent use by the employee in the business of his employer.[26]

Two points are evident from this statement. First, the court made it quite clear that the control of the details of the operation of the car was a less preferable basis for imposing liability on the employer than the determination that the employer had the capacity to control the general activities of the employee. Second, the court indicated that a finding of either express or implied authority was sufficient evidence of the employer's control over the employee to warrant the imposition of liability upon the employer.

Evidence of such authorization can be quite varied. In *United States v. Farmer*[27] the court concluded that under Iowa law, the United States was liable for injuries to a third person who was injured by an army national guardsman who was traveling by private conveyance. As evidence of the government's right to control its employee, the court noted that the government had expressly ordered the soldier to proceed to his home base. In terms of implied authority, the court noted that the government allowed the guardsman to travel by private automobile and gave him a travel allowance to cover the costs of travel by private conveyance. It also recognized that the soldier remained on active duty while traveling and continued to be paid during that time.[28] The court was persuaded by this evidence of authorization and found that it was indicative of control. Thus, liability was imposed on the government.

While the court in applying Iowa law held that authorization by an employer was evidence of control, other jurisdictions have held that a lack of authorization does not mean control is absent. For instance, in *Pelletier v. Bilbiles*[29] the Connecticut Supreme Court stated, "The fact that the specific method a servant employs to accomplish his master's orders is not authorized does not relieve the master from liability."[30] However, the question still remained as to

[26] Peterson v. Brinn & Jensen Co., 134 Neb. 909, 911, 280 N.W. 171, 172 (1938).
[27] 400 F.2d 107 (8th Cir. 1968).
[28] Id. at 110-111.
[29] 154 Conn. 544, 227 A.2d 251 (1967).
[30] Id. at 548, 227 A.2d at 253.

how, and in what circumstances, the court would find control and impose liability on an employer.

The Nebraska Supreme Court answered this by indicating a different control test: "The law imputes to the principal or master responsibility for the negligent acts of his agent or servant done . . . within the scope of the employee's authority *or employment in his master's business. . . .*"[31] (Emphasis added.)

In determining whether an employee has acted within the scope of his employment in his master's business, commonly called "in the furtherance of his master's business," the courts have distinguished three types of cases. In the first type of case, where the employee served the purpose of the master and at the same time served no purpose of his own, the courts have held that the employee was acting in the furtherance of his master's business, and have imposed liability solely on the employer.

Thus, in *Cooner v. United States,*[32] a case in which an army major was involved in a collision with another vehicle while en route to a new duty station, the court found the government liable to the plaintiffs and said:

> [N]o one factor is controlling, but the question is, taking everything into consideration, whether the person causing the injury is the defendant's servant, and whether he is, at the time of the accident, engaged in his own or in his master's business. Certainly, under the principles evolved in the New York cases, he was a servant primarily on his master's business, rather than his own. He was, to repeat, performing a specific duty under explicit directions to do so. . . . He had no personal motive in making the trip.[33]

In the second type of case, where the courts have found that the employee has clearly been serving a purpose of his own while not serving any purpose of the master, the master has been relieved of liability. Thus, the employer of a truck driver was not held liable for the injuries suffered by a third person when the truck driver deviated substantially from the directions and route given by the employer and was thereafter involved in a collision.[34]

Where the employee has either failed to comply strictly with the instructions of the master or has served a purpose of his own at the same time he has been serving the purpose of the master, the courts have held the employer liable.[35] For example, in *United States*

[31] Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 30-31, 8 N.W. 2d 451, 455 (1943).

[32] 276 F.2d 220 (4th Cir. 1960).

[33] Id. at 234.

[34] Mosqueda v. Albright Transfer & Storage Co., 320 S.W.2d 867 (Tex. Ct. App. 1959).

[35] This is the so-called dual purpose rule. See 1 Restatement of Agency Second §236.

v. Mraz,[36] a case in which an air force officer detoured to do some sightseeing while en route to a new duty station, the court quoted from a Washington state case which held that:

> Where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master.[37]

Thus the employer was held liable if the acts were done while the employee was acting in the furtherance of the master's business and the acts did not "arise wholly from some external, independent and personal motive on the part of [the servant]."[38]

If it cannot be determined that the employee has been acting in the furtherance of the master's business, the court in *Van Auker v. Steckley's Hybrid Seed Corn Co.*[39] states that it is only necessary to show that the servant "acted within the scope of [his] authority" in order to have liability imposed on the employer.[40] By this, the court meant that where there was neither an express nor implied authorization for an employee to engage in an activity on behalf of the employer, control was established if there were some indicia of apparent authority whereby the employee's capacity to perform certain activities was derived from his general competence to act on the master's behalf. Thus it should be noted that real authority is not necessary to establish control, but rather, control can also be established by a showing of apparent authority.[41]

In *Konick* the Court discarded the *Pyyny* control test because it was fundamentally unfair in allowing employers to avoid liability in all but the narrowest of circumstances. The tests for employer control and liability found in *Van Auker* seem to give the best assurance that responsibility will be placed on employers for injuries resulting from business-related risks, while at the same time reducing the possibility that only the employee will be burdened with liability which is properly attributable to his employer. In this respect, the courts of Massachusetts should find the requisite control where there is (1) express or implied authority for the employee to act on behalf of the employer; or where there is (2) apparent authority for the employee to act on behalf of the employer (provided that the employee does not violate

36 255 F.2d 115 (10th Cir. 1958).

37 Id. at 117, citing Carmin v. Port of Seattle, 10 Wash. 2d 139, 154, 116 P.2d 338, 344 (1941).

38 Id. at 118; see Grant v. Singer Mfg. Co., 190 Mass. 489, 77 N.E. 480 (1906).

39 143 Neb. 24, 8 N.W.2d 451 (1943).

40 Id. at 30-31, 8 N.W.2d at 455.

41 Id. See also Keener v. Jack Cole Trucking Co. 233 F. Supp. 181 (W.D. Ky. 1964); Alterman v. Lydick, 241 F.2d 50 (7th Cir. 1957).

the specific instructions of the employer); or where (3) the act is done within the scope of employment in the master's business, that is, in the furtherance of the master's business.

CHARLES BLUMSACK

§1.19. **Nondisclosure: Half-truth doctrine: Kannavos v. Annino.**[1] On June 28 and July 12, 1965, the plaintiffs, Apostolos C. Kannavos, his wife and John G. Bellas, purchased several multi-family housing units from Annino Realty Trust and others, the defendants. An advertisement[2] had been placed by the defendants in a newspaper offering their real estate for sale. The advertisement stressed the income earning aspects of the realty. Plaintiffs, who were interested in acquiring income producing real estate, saw the advertisement and inquired about the property. Defendants furnished the plaintiffs with the rental income and expense reports while they showed the plaintiffs the property. The defendants also told the plaintiffs that the units were rented as multi-family units and that the plaintiffs could continue to operate them as such.[3]

The real estate involved here was originally purchased by the defendants in 1961 and 1962 as single family houses. Each house was located in an area zoned only for single family residences. Despite the zoning restrictions and the lack of necessary building permits, the defendants had converted the property into multi-family apartment houses. The defendants knew that the zoning ordinances prohibited using the realty as multi-family units;[4] however, at the time of the sale, the property was still being operated in violation of such regulations. During the negotiations with the plaintiffs, the defendants failed to disclose the fact that the zoning restrictions were being violated or that the defendants lacked the required building permits.

Because the plaintiffs had had no prior experience in real estate transactions, they asked the defendants no questions about the zoning codes or building permits. The negotiations were conducted by the plaintiffs without the aid of an attorney. The defendants said nothing actually false or fraudulent; the plaintiffs complained of no verbal misrepresentations.

On July 26, 1965, after the plaintiffs had purchased the real estate, the city of Springfield notified them that they were operating the properties in violation of both the zoning ordinances and the building codes.[5] The city then brought civil proceedings to abate the use of

§1.19. [1] 1969 Mass. Adv. Sh. 813, 247 N.E.2d 708.

[2] Id. at 814, 247 N.E.2d at 709. The advertisement stated: "Income gross $9600 yr. in lg. single house, converted to 8 lovely, completely furn. (includ. TV and china) apts. 8 baths, ideal for couple to live free with excellent income. By apt. [sic] only. Foote Realty."

[3] Id. at 815-816, 247 N.E.2d at 710.

[4] Id. at 814, 247 N.E.2d at 709.

[5] Id. at 816, 247 N.E.2d at 710.

the properties as multi-family dwellings.[6] The plaintiffs brought a bill in equity to rescind. The suits in equity were heard in the superior court on a master's report,[7] where a decision for the plaintiffs was reached.

On appeal to the Supreme Judicial Court, the Court affirmed the lower court's decision and HELD: (1) The defendants had done and said enough so that they were bound to do more to avoid deception of the plaintiff,[8] and (2) Plaintiffs' failure to conduct a reasonable investigation was not a bar to recovery.[9] The Court found that the defendants' advertisement, rental income and expense reports, and statement that the plaintiffs could continue to operate the properties as multi-family units were not false in and of themselves but that taken together misled the plaintiffs.[10] The Court concluded that having made these representations, the defendants were under a further duty to disclose that the premises were being operated unlawfully.[11] The result of this failure to disclose in conjunction with the statements actually made was to create an actionable misrepresentation.[12]

Implicit in the Court's finding that the defendants were liable is a reaffirmation of the doctrine of no liability for bare nondisclosure,[13] in respect to which the Court has said:

> We assume that, if the vendors [defendants] had been wholly silent and had made no reference whatsoever to the use of the . . . houses, they could not have been found to have made any misrepresentation.[14]

This doctrine of no duty to disclose in the absence of other statements or circumstances raising such a duty has existed in the law since the decision in 1873 of *Peek v. Gurney*.[15] In 1942, *Swinton v. Whitinsville Savings Bank*[16] firmly established that doctrine in Massachusetts. *Swinton* was an appeal from an order sustaining a demurrer to the declaration by the plaintiffs that the defendant had fraudulently concealed the existence of termites in a house sold to the plaintiffs. The Supreme Judicial Court, in affirming the lower court's order, said that absent a relationship of trust or confidence between the parties, false statements, or attempts to prevent the plaintiff from

6 Ibid.
7 Id. at 813, 247 N.E.2d at 708.
8 Id. at 820, 247 N.E.2d at 712.
9 Ibid.
10 Id. at 820, 247 N.E.2d at 713.
11 Ibid.
12 For general reference to nondisclosure and the duty to disclose, see Keeton, Fraud—Concealment and Non-Disclosure, 15 Texas L. Rev. 1 (1936).
13 Swinton v. Whitinsville Savings Bank, 311 Mass. 677, 42 N.E.2d 808 (1942); Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454 (1921).
14 Kannavos v. Annino, 1969 Mass. Adv. Sh. at 817, 247 N.E.2d at 710.
15 L.R. 6 H.L. 377, [1861-1875] All E.R. 116 (1873).
16 311 Mass. 677, 42 N.E.2d 808 (1942).

obtaining information, the defendant had no duty to disclose any information.[17] The Court felt that the difficulty that the plaintiffs might have in discovering the defect had no bearing on the defendants' duty to disclose that defect.[18]

The rule of no liability for bare nondisclosure is applied by a majority of jurisdictions.[19] However, several jurisdictions have broken away from the *Swinton* rule.[20] The courts in these jurisdictions require a vendor to disclose all material facts[21] even in the absence of either a relationship of trust or confidence or misleading statements; one such jurisdiction is California. An example of the California approach is *Kallgren v. Steele*,[22] where the plaintiff purchased a mountain resort which had been operated for 30 years. At the time of the purchase the defendant vendor failed to inform the plaintiff that the resort had been built so as to encroach on the public highway. After the sale, the plaintiff was notified that his permit to operate would be revoked because of the resort's encroachment on the highway. In an action for damages the court held that the vendor was under a duty to disclose the fact of the encroachment and that a vendor must disclose all facts which materially affect the desirability of the property.[23]

The California rule results in liability for bare nondisclosure. The Massachusetts rule, however, produces liability only when something more is attributed to the defendant than mere nondisclosure. As a result, the Massachusetts rule creates a disparity of results which is eliminated under the California rule. To illustrate, assume that vendors A and B have termites in their respective houses. Both houses are at the same stage of deterioration. The effects, however, of the termites can be seen in B's house, whereas in A's house the damage is invisible and hard to detect. B, before selling his house, hides the visible effects of the termites; his actions have not cured the defect but have merely made it undetectable. A sells his house without disclosing the termites. Under the Massachusetts rule, A would be free from any liability; B, however, would be liable since his actions involve more than bare nondisclosure. Under the California rule, since

[17] Id. at 678, 42 N.E.2d at 808.

[18] Id. at 679, 42 N.E.2d at 809; accord, Donahue v. Stephens, 342 Mass. 89, 172 N.E.2d 101 (1961); Spencer v. Gabriel, 328 Mass. 1, 101 N.E.2d 369 (1951).

[19] 2 Idaho L. Rev. 112 (1965); see, Henrick v. Lynn, 37 Del. Ch. 402, 144 A.2d 147 (1958); Fegeas v. Sherrill, 218 Md. 472, 147 A.2d 223 (1958).

[20] 2 Idaho L. Rev. 112 (1965).

[21] 3 Restatement of Torts §538. Subsection (2) states: "(2) A fact is material if (a) its existence or nonexistence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question, or (b) the maker of the representation knows that its recipient is likely to regard the fact as important although a reasonable man would not so regard it."

[22] 131 Cal. App. 2d 43, 279 P.2d 1027 (1955); Kuhn v. Gottfried, 103 Cal. App. 2d 80, 229 P.2d 137 (1951); accord Lingsch v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963).

[23] Kallgren v. Steele, 131 Cal. App. 2d at 46, 279 P.2d at 1029.

the presence of termites is material to the transaction, both vendors would be liable. Massachusettts requires some affirmative action on the part of the vendor to find liability for nondisclosure. Therefore, liability will result only for extrinsic defects concealed but not for intrinsic defects not disclosed.

The difference in results between the above hypothetical cases under the Massachusetts rule arises from a philosophy prevalent in the common law. The common law stressed the doctrine of caveat emptor. Although it was not proper for a vendor to use chicanery to take advantage of a purchaser, he was entitled to any benefits accruing from his shrewdness. Thus he was not required to disclose to a purchaser all he knew. "The courts felt that they were not the protectors of morality, but the dispensers of the rule of law."[24]

The thrust of the *Kannavos* decision is that since the defendants made some statements about income from the property, they were bound to reveal all the information which was necessary to prevent their statements from being deceptive and misleading.[25] *Kidney v. Stoddard*[26] is an early Massachusetts case dealing with the above proposition. In *Kidney,* a father sent a letter to a merchant requesting that credit be extended to his son. Although the father indicated that his son would take care of all his accounts promptly, the father failed to mention his son's minority. The merchant, relying on the letter, sold the son merchandise on credit. When the son refused to pay the debt, the merchant sought to collect from the father, who also refused to pay.[27] The merchant then brought suit against the father in an action of trespass on the case for fraudulent misrepresentation. The Court held that when some representations are made and material facts are concealed with an intent to deceive, the concealment is fraudulent.[28] Just as the defendant in *Kidney* knew that his son would not receive credit if his age were known, the defendants in *Kannavos* knew that if the zoning regulations were known, they would not be able to sell the property as multi-dwelling units. Thus, in such a case, any statements which may be deceiving unless other information is disclosed are fraudulent.

By finding defendants liable on the basis of partial and incomplete statements, the Court appears to disregard the possibility that defendants' statement that the plaintiff could continue to operate the property as multi-dwelling units[29] may have been a fraudulent misrepresentation. In an earlier case, *Burns v. Dockray,*[30] the Court said that statements which a seller knows are false, or the truth or falsity

24 Goldfarb, Fraud and Nondisclosure in the Vendor-Purchaser Relation, 3 W. Res. L. Rev. 5, 9 (1957).
25 Kannavos v. Annino, 1969 Mass. Adv. Sh. at 820, 247 N.E.2d at 713.
26 48 Mass. 252 (1843).
27 Id. at 253.
28 Id. at 255.
29 1969 Mass. Adv. Sh. at 815-816, 247 N.E.2d at 710.
30 156 Mass. 135, 30 N.E. 551 (1892).

of which the seller is ignorant but which he stated as being true, are fraudulent misrepresentations.[31] *Burns* involved representations made by a seller of real property that he could convey good title to the property.[32] The vendor made this representation despite the fact that he knew he had obtained the property from a man who, shortly after the sale, was adjudged insane. The facts of *Kannavos* closely parallel those of *Burns*. The defendant in *Kannavos* like the one in *Burns* made a positive statement of fact. Each defendant knew that the actual state of facts was different than those they had represented. Both defendants therefore made expressly fraudulent misrepresentations.

The ambiguous manner in which the Court held that the defendants' disclosure was inadequate gives rise to the question whether defendants' actions, if taken separately, would have resulted in liability for inadequate disclosure. The Court stated: "We conclude enough was done affirmatively to make disclosure inadequate and partial . . . ."[33] What constituted "enough"? To illustrate, the defendants' statement that plaintiffs could continue to operate the property as multi-dwelling units should alone result in liability as a half-truth in that more had to be said so that the statement could be correctly understood. The advertisement and income statements taken individually should also render defendants liable. The advertisement emphasized the income producing aspects of the property and the income statements indicated to the plaintiffs exactly the amount of profit they could expect to make. When defendants said nothing to qualify either the advertisement or the income statement, their silence constituted a tacit representation, indicating to the plaintiffs that there were no further facts to affect what they had already been told. The fact that the city could prevent the property from producing income at its present rate required disclosure. When the subject of income from the property was mentioned, all pertinent information relating thereto should have been revealed.[34]

The Court categorically states that if the defendants had remained silent they would not have been liable.[35] This statement ignores the implied representation arising from the actual income producing status and the appearance of the property. In *French v. Vining*,[36] the Court stated that "A buyer has a right to believe that the thing sold is what it appears to be."[37] The property appeared as legally operated multi-family units. The plaintiffs should have been able to rely on this

[31] Id. at 137, 30 N.E. at 552.

[32] Id. at 136, 30 N.E. at 552.

[33] 1969 Mass. Adv. Sh. at 820, 247 N.E.2d at 712.

[34] In International Trust Co. v. Myers, 241 Mass. 509, 135 N.E. 697 (1922), rev'd on other grounds, 263 U.S. 64 (1923), the defendants supplied a copy of their income statement to the plaintiff. The defendants failed to state that their accounts receivable had been assigned. The Court held that the concealment was a material misrepresentation.

[35] 1969 Mass. Adv. Sh. at 817, 247 N.E.2d at 711.

[36] 102 Mass. 133 (1869).

[37] Id. at 136.

appearance. In addition, the sale of the property as multi-family units should be considered equivalent to an affirmation by the defendants of the apparent fact that they were being operated legally as such. Thus the defendants should have been held liable without having made any statements to the plaintiff.

Neither the plaintiffs in arguing the case[38] nor the Court in deciding it referred to the Restatement of Contracts' treatment of the duty to disclose.[39] The Restatement requires that facts unknown by one party must be disclosed when those facts, if unknown by both parties, would be sufficient to render the contract voidable as a mutual mistake of subject matter.[40] This section of the Restatement was used to grant rescission in *Curran v. Heslop*[41] by the California District Court of Appeals. That case similarly involved nondisclosure of violations of building codes by the vendors of real property. As a result, the Restatement's position would also have required rescission in the *Kannavos* case. The plaintiffs in *Kannavos* erroneously believed that the property was being operated legally as multi-family dwellings. If both parties had been unaware of the zoning violations the contract would have been voidable because of a mutual mistake in subject matter. Thus, according to the Restatement, the defendants have a duty to disclose the violation.

Another analysis of the case is suggested by the Tentative Draft of the Restatement of Torts Second.[42] The Restatement's approach would comply with *Kannavos* by finding liability for undisclosed matters which are necessary to prevent information already disclosed from being misleading.[43] However, the Restatement also proposes that liability results when the undisclosed information is a fact "basic to the transaction."[44] Facts basic to the transaction as perceived by the Restatement are facts that go to the essence of the contract.[45] The essence of the contract in *Kannavos* was the sale and purchase of multi-

[38] See Plaintiff's Brief.

[39] 2 Restatement of Contracts §472.

[40] A classic example of a mutual mistake of subject matter is Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887). The defendant sold to the plaintiff what both thought was a barren cow. Before delivery of the cow it was discovered that the cow was with calf. The defendant refused to deliver the cow. The court held that the contract was voidable since both parties had bargained about a barren cow. There existed a mutual mistake of subject matter.

[41] 115 Cal. App. 2d 476, 480, 252 P.2d 378, 380 (1953).

[42] Restatement of Torts Second §551 (Tent. Draft No. 11, 1965).

[43] Id. at 42. §551(2) states: "One party to a business transaction is under a duty to disclose to the other before the transaction is consummated . . . such additional matters as he knows or believes to be necessary to prevent his partial statement of facts from being misleading. . . ."

[44] Id. at 42-43. §551(2) states: "One party to a business transaction is under a duty to disclose to the other before the transaction is consummated . . . facts basic to the transaction, if he knows that the other is about to enter into the transaction under a mistake as to such facts, and that the other, because of the relationship between them, the customs in the trade, or other objective circumstances, would reasonably expect a disclosure of such facts."

[45] Id. at 43.

family units for rental purposes. The fact that the property could legally be operated as such would be a fact basic to the transaction.

The "facts basic to the transaction" approach creates an affirmative duty of disclosure when one party knows or has reason to believe that the other party is under a mistake as to such facts. The Restatement attempts with this approach[46] to eliminate decisions such as *Swinton v. Whitinsville Savings Bank.*[47] The term "basic facts" parallels the term "material facts" as used in the Restatement of Contracts.[48] The Restatement of Torts distinguishes between basic facts and material facts as those facts respectively which go to the purpose of the contract and those that just serve as "important and persuasive inducements to enter into the contract."[49] According to the Restatement, the law may be moving in the direction of requiring disclosure of material facts but at the present time disclosure is only required of basic facts.[50]

As stated above, the Restatements and cases from some jurisdictions require an affirmative duty to disclose material or basic facts. However, it appears from *Kannavos* that there is still no such duty in Massachusetts. The law in Massachusetts will only adjudge silence to be a misrepresentation when the circumstances involved in the transaction require something more in the way of disclosure. These circumstances include the making of statements which when taken alone misrepresent the state of facts, as in *Kannavos,* and where a fiduciary relationship is found.[51]

The duty to disclose in fiduciary situations applies not only to formal relationships such as principal and agent, executor and beneficiary, or bank and depositor, but also to any situation in which a feeling of trust and confidence is present.[52]

A case embodying this latter proposition is *Reed v. A. E. Little Co.*[53] The plaintiff, an inventor, entered the employment of the defendant corporation at the age of 63. The employment contract stated that the plaintiff was to receive 10 percent of any money received by the corporation from a sale of any of the plaintiff's inventions. The plaintiff, inexperienced in business matters, looked to the president of the corporation as his friend and business advisor. The corporation, while negotiating a sale of the plaintiff's inventions for $3 million, suggested to the plaintiff that the original contract of employment be changed

[46] Ibid.

[47] See page 37 *supra,* text and note 13.

[48] Burns v. Dockray, 156 Mass. 135, 30 N.E. 551, (1892).

[49] Restatement of Torts Second §551, Comment on clause (e), at 49 (Tent. Draft No. 11, 1965).

[50] Restatement of Torts Second §551, at 44 (Tent. Draft No. 11, 1965).

[51] Van Houten v. Morse, 162 Mass. 414, 38 N.E. 705 (1894); White Tower Management Corp. v. Taglino, 302 Mass. 453, 19 N.E.2d 700 (1939). When statements which are only partial disclosures are made, it makes no difference whether the information revealed is in response to a question or is offered voluntarily. Where any information is given a duty exists to furnish all the facts to assure a correct understanding.

[52] Prosser, The Law of Torts §101 (3d ed. 1964).

[53] 256 Mass. 442, 152 N.E. 918 (1926).

to call for an immediate payment of between $50 and $75 thousand to the plaintiff for the rights to the inventions. The plaintiff asked the president for advice as to the matter. The president responded that he thought that the new contract would be in the plaintiff's best interest.[54] When the plaintiff learned of the sale of his inventions for $3 million, he sued to rescind the second contract. The Court, in overruling a demurrer to the complaint, held that there was a duty to disclose when one party puts confidence in the integrity of another and the latter accepts the confidence.[55]

Having analyzed the duties of vendors, one should examine any possible duty imposed on the buyer to make an investigation. The Court in *Kannavos,* in enabling the plaintiffs to rescind their purchase agreement, held that the plaintiffs were under no duty to discover the zoning and building regulations pertaining to the properties, even though the facts were of public record.[56] The Court relied on its 1954 decision in *Yorke v. Taylor.*[57] *Yorke* overruled past decisions holding that a plaintiff could not recover if he could have discovered the defect with reasonable investigation. The rationale behind these earlier decisions was that "the law will not relieve those who suffer damages by reason of their own negligence or folly."[58]

The facts in *Yorke* involved an innocent misrepresentation as to the assessed value of real estate.[59] This misrepresentation had resulted from the defendants' not having received their notice of increased assessment from the agent who was in charge of the property. The information was available at the public assessor's office. Although the plaintiffs had visited the office, they had failed to discover the latest valuation. In holding that the plaintiffs would not be barred from recovering, the Court said:

> The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation.[60]

Kannavos is a stronger case for the above proposition. Whereas *Yorke* involved an innocent misrepresentation, in *Kannavos,* the Court found that the defendants' actions were intentionally deceptive and fraudulent.[61] The more culpable the defendant, the less rationale there is in preventing a plaintiff from recovering, regardless of failure to investigate.

The *Yorke* case states that a person is justified in believing that

54 Id. at 446, 152 N.E. at 919.
55 Id. at 449, 152 N.E. at 920, 921.
56 See page 37 *supra,* text at note 9.
57 332 Mass. 368, 124 N.E.2d 912 (1955).
58 Silver v. Frazier, 85 Mass. 382, 389 (1862).
59 332 Mass. at 371, 124 N.E.2d at 914.
60 Id. at 374, 124 N.E.2d at 916, citing 3 Restatement of Torts §540.
61 See page 37 *supra,* text at note 8.

which is represented to him as the truth. Thus *Yorke* and *Kannavos* together stand for the proposition that a man may believe that everything material is being told to him, that it is true, and that nothing is being withheld. This case represents a major change from the era of caveat emptor. The courts should now take another step to include those cases where nothing at all is said, so that men may be able to rely on silence as indicating there are no material facts undisclosed.

JASON R. FELTON

§1.20. Charitable tort immunity. During the 1969 SURVEY year the Massachusetts Supreme Judicial Court issued a letter[1] requesting amici curiae briefs on the issue of charitable tort immunity. The request arose out of the case of *Grover, Administrator v. Christian Science Benevolent Assn.*[2] The superior court sustained a demurrer by the defendant on the ground that in Massachusetts charitable institutions, as defined by Chapter 180 of the General Laws, are exempt from tort liability.[3] The plaintiff appealed and hearing was set for October 1969. Prior to the date of hearing a settlement was reached. The combination of a request for amici briefs by the Court and the sudden settlement by the charity, brings to life the long dormant issue of charitable tort immunity in the Commonwealth.[4]

Although occurring after the close of the 1969 SURVEY year, the Supreme Judicial Court has taken further action since the settlement of the *Grover* case. Late in December 1969, the Court handed down an opinion in the charitable tort case of *Colby v. Carney Hospital.*[5] In *Colby,* the defendant set up the charitable tort immunity as a defense before the superior court. The plaintiff demurred to this defense, claiming that such a defense was repugnant to the Massachusetts Declaration of Rights[6] and United States Constitution.[7] The demurrer was overruled and the plaintiff appealed.

The Supreme Judicial Court held that the immunity was constitutional: "Nothing has been brought to our attention suggesting that the doctrine of charitable immunity is repugnant to . . . the Constitutions of the United States and the Commonwealth."[8] In dicta, however, the Court noted their previous stand and then stated, in no uncertain terms, that charitable tort immunity has served its purpose and will be abrogated:

§1.20. 1 See 13 Boston B.J. 4 (No. 8, 1969).

2 Law No. N-14, at 232.

3 McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876).

4 As recently as 1965, in Harrigan v. Cape Cod Hospital, 349 Mass. 765, 208 N.E.2d 232, the Court affirmed the position that any change must be by the legislature.

5 1969 Mass. Adv. Sh. 1437, 254 N.E.2d 407.

6 Articles 1, 10, 11, 12 and 20.

7 Amendments 5 and 14.

8 Colby v. Carney Hospital, 1969 Mass. Adv. Sh. 1437, 254 N.E.2d 407.

> In the past on many occasions we have declined to renounce the defense of charitable immunity . . . because we were of opinion that any renunciation . . . should be accomplished prospectively . . . by legislative action. Now it appears that only three or four States still adhere to the doctrine.[9] It seems likely that no legislative action in this Commonwealth is probable in the near future. Accordingly, we take this occasion to *give adequate warning that the next time* we are squarely confronted by a legal question respecting the charitable immunity doctrine *it is our intention to abolish it.* [Emphasis added.][10]

What the Court did, in effect, was determine that the immunity no longer commends itself to propagation and, to avoid the unfairness of leaving charities unprotected for past torts on which the statute of limitations has not yet run, has stated its next holding in advance. Of course the claim in this case, one of constitutionality, was properly denied. This does mean, however, that should Colby be defeated below based on the immunity, he can and will, succeed on appeal. This dicta also gives Massachusetts charities the opportunity to acquire insurance before the immunity doctrine is abrogated.

What the Court has not stated is the extent and method by which it will abolish the immunity. This could be done immediately and totally; that is, charities are liable and and will be so held in every case hereafter. This could create financial problems for tortious acts occurring before the charities acquired insurance. The Court could limit the abolition to specific types of charities.[11] It could also make the new liability prospective, saying, in effect, charities are liable in this case and in all cases arising after this date.[12] The last approach, a prospective ruling, seems the fairest since it will hurt only the vehicle charity. All other charities, with the *Colby* warning, could be insured by that date.

The dicta in *Colby* was not without forewarning. Beginning with *Foley v. Wesson Memorial Hospital*[13] in 1923, the Court, while affirming the doctrine, began hinting that a change might be desirable. In *Foley*, the Court noted that while a change might be appropriate, any such change would have to come from the legislature. Perhaps the strongest statement on change before *Colby* was in *Simpson v. The Truesdale Hospital, Inc.*,[14] decided in 1958:

> While as an original proposition the doctrine might not commend itself to us today, it has been firmly imbedded in our law

[9] Citing 2 Restatement of Trusts Second §402(2) and Comment on subsection (2), and Prosser on Torts (3d ed.) §127, at 1021-1024.

[10] Colby v. Carney Hospital, 1969 Mass. Adv. Sh. at 1437-1438, 254 N.E.2d at 408.

[11] For example, just hospitals. See Kojio v. Doctor's Hospital, 12 Wis. 2d 367, 107 N.W.2d 131 (1961).

[12] See; Rabon v. Rowan Memorial Hospital Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).

[13] 246 Mass. 363, 141 N.E. 113 (1923).

[14] 338 Mass. 787, 154 N.E.2d 357 (1958).

> for over three quarters of a century and we think that its "termination should be at legislative, rather than at judicial hands." [Citation omitted.][15]

The cases since 1958 have affirmed the *Simpson* dicta on change.[16]

While the Court has been indirectly advising that the General Court change the charitable tort immunity, the legislature has not overlooked the issue. There are perennial bills[17] introduced in both houses of the legislature to terminate the immunity either totally or with a minor restriction. They are perennially defeated.[18]

The legislature has thus shown that it will not act. Perhaps the charities' influence is very strong, but whatever the reason, it became glaringly apparent that the only way the charitable tort immunity doctrine will be abolished is by the Supreme Judicial Court. The Court finally recognized this in *Colby*. However the Court determines to abolish the immunity, it is time that this doctrine, originating in the United States in Massachusetts on a misreading of the then current English law, should be abolished. The situation will then be more equitable and in line with modern law in the rest of the United States and other common law countries.

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[15] Id. at 787-788, 154 N.E.2d at 358.

[16] See Harrigan v. Cape Cod Hospital, 349 Mass. 765, 208 N.E.2d 232 (1965); Boxer v. Boston Symphony Orchestra, Inc., 342 Mass. 537, 174 N.E.2d 363 (1961); Barrett v. Brooks Hospital, Inc., 338 Mass. 754, 157 N.E.2d 638, (1959).

[17] 1968: S. Doc. 359, H.R. Docs. 367, 485, 712, 726, 730, 2367, 3670, 4197; 1966: S. Doc. 228, H.R. Doc. 2462; 1961; H.R. Docs. 527, 535, 1578: 1960 S. Doc. 62; 1959: H.R. Doc. 1248.

[18] See 1966 Ann. Surv. Mass. Law §4.17; 1965 id. §5.13; 1964 id. §5.12; 1963 id. §3.15.

CHAPTER 2

Comparative Negligence

JAMES W. SMITH

§2.1. Introduction. For over 100 years the law of Massachusetts has been that, where the plaintiff's own negligence contributed as an efficient cause of his injury, he is totally barred from recovery even though the defendant was also guilty of negligence which contributed proximately to the result.[1] Chapter 761 of the Acts of 1969 abolishes this rule and establishes in Massachusetts the doctrine of comparative negligence.

Chapter 761, which becomes effective on January 1, 1971, and applies only to causes of action arising on or after that date, amends Chapter 231 of the General Laws by striking out Section 85 and inserting in place thereof the following:

> §85. *Contributory Negligence No Bar to Recovery of Damages; Findings of Fact or Special Verdict; Reduction of Damages by Court.* Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.
>
> In any such action the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict, which shall state:
>
> (1) the amount of the damages which would have been recoverable if there had been no contributory negligence; and
>
> (2) the degree of negligence of each party, expressed as a percentage.
>
> Upon such findings of fact or the return of such a special verdict by the jury, the court shall reduce the amount of the damages in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided, however, that if said proportion is equal to or greater than the negligence of the person against whom recovery is sought,

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§2.1. [1] Brown v. Kendall, 60 Mass. 292 (1850).

then, in such event, the court shall enter judgment for the defendant.

The basic operation of the Massachusetts comparative negligence statute is not particularly complex. In a jury trial, the jury returns a special verdict stating the amount of the damages which would have been recoverable had there been no contributory negligence, and the degree of negligence of each party expressed as a percentage. In a nonjury trial these findings are made by the judge. If the percentage of negligence attributable to the plaintiff equals or exceeds that percentage attributable to the defendant, the court enters judgment for the defendant.[2] If the plaintiff's percentage of negligence is less than the defendant's percentage, the court reduces the plaintiff's damages in proportion to the amount of negligence attributable to him. The proportionate reduction is based upon the ratio that the plaintiff's negligence bears to the combined negligence of plaintiff and defendant (usually 100 percent) and not the ratio that the plaintiff's negligence bears to the defendant's.[3] Thus, if the plaintiff was found 20 percent negligent and the defendant 80 percent negligent, the plaintiff's recovery would be reduced by 20 percent (20/100) and not by 25 percent (20/80).

A. Principal Features of the Statute

§2.2. Special verdict. The requirement that the jury return a special verdict has two purposes. One is based upon a fear that a jury, if allowed to render a general verdict, may not reduce the plaintiff's damages as instructed. While it is true that a jury today may ignore contributory negligence or compromise its verdict, the overall danger of a sympathetic jury ignoring the instructions of the trial judge

[2] The operation of this part of the statute leads to the apparently illogical result that, if the plaintiff is 45 percent negligent, he recovers 55 percent of his damages; whereas, if he is 50 percent negligent, he recovers nothing. While this limitation has been criticized as "too much shot through with the noxious and stultifying contributory negligence notion" (see 32 A.T.L.J. 741, 768, 1968), it does seem that there ought to be a point where the plaintiff's own negligence so substantially contributes to his injury that recovery should be denied, particularly with respect to damages for intangibles, i.e., pain and suffering.

Similar limitations exist in Arkansas (Ark. Stat. Ann. §27-1730 (1962)); Maine (Me. Rev. Stat. Ann. tit. 14 §156 (Supp. 1965)); and Wisconsin (Wis. Stat. §895-045 (1963). Mississippi on the other hand has a so-called "pure" comparative negligence statute. (Miss. Code Ann. §1454 (1956)).

New Hampshire recently enacted a comparative negligence statute which has a slight variation on this percentage test. N.H. Rev. Stat. Ann. §507:7a (1969). The New Hampshire statute allows the plaintiff a partial recovery "if his negligence was not greater than the causal negligence of the defendant. . . ." Thus, whereas in Massachusetts a finding of 50 percent negligence on the part of the plaintiff would bar recovery, in New Hampshire, a finding of 51 percent negligence on the plaintiff's part would be necessary to bar recovery. The difference is purely academic.

[3] See Cameron v. Union Automobile Ins. Co., 210 Wis. 659, 246 N.W. 420 (1933), rehearing denied, 210 Wis. 668, 247 N.W. 453 (1933).